2008

Steve Richards v. Diana Brown : Brief of Appellant

Utah Court of Appeals

UTAH COURT OF APPEALS

STEVE RICHARDS,

Petitioner/Appellant,

vs.

DIANA BROWN,

Respondent/Appellee.

BRIEF OF APPELLANT

20080682-CA

Case No. 064906011

BRIEF OF APPELLANT

Appeal of the Judgment and Order of the Honorable Denise Lindberg,
Third District Court, Salt Lake County, State of Utah.

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Petitioner/APPELLANT (hereinafter "Petitioner" or "Mr. Richards") submits the following as his opening brief in the above-referenced appeal:

STATEMENT OF JURISDICTION

Jurisdiction to review the final judgment and order of a District Court in a domestic relations matter is vested in the Utah Court of Appeals pursuant to the Utah Rules of Appellate Procedure, Rules 3 and 4, and U.C.A. § 78(a)-4-103(2)(h).

STATEMENT OF THE ISSUES AND STANDARD OF REVIEW

Issue No. 1: Did the Trial Court commit a substantial and prejudicial

error sufficient to reverse and/or remand the issue when it ignored the plain language of the Common Law Marriage Statute regarding the "termination of the relationship" and granted summary judgment to the Respondent?

Standard of Review: To demonstrate prejudice, appellants must show reasonable likelihood that without the error, there would have been a different result. *See Tingey v. Christensen,* 373 Utah Adv. Rep.10, 12 (Utah 1999). A district court's interpretation of a statute is a legal question and therefore the standard of review is one of correctness. *Jeffs v. Stubbs*, 970 P.2d 1234, 1244 (Utah 1998). "Correctness means the appellate court decides the matter for itself and does not defer in any degree to the trial judge's determinations of law." *State v. Pena*, 869 P.2d 932, 935 (Utah 1996). Moreover, summary judgment is also reviewed for correctness and is only appropriate "when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." *Wilcox v. Anchor Waste Co.*, 164 P.3d 353, 356 (Utah 2007) (*citing Norman v. Arnold*, 57 P.3d 997 (Utah 2002) and Utah R.Civ.P. 56(c).

When deciding whether a trial court correctly found that there was no genuine issue of material fact, the appellate court reviews the facts and inferences to be drawn therefrom in the light most favorable to the losing party. *In Re Marriage of Gonzalez*, 1 P.3d 1074, 1076 (Utah 2000) (other citation omitted).

Issue No. 2. Did the trial court err by refusing to take evidence on the disputed fact of when "termination of the relationship" occurred under the Utah common law

marriage statute.

Standard of Review: Whether a statute applies to a particular set of facts is a question of law and is therefore reviewed for correctness. *See Rushton v. Salt Lake County*, 977 P.2d 1201, 1203 (Utah 1993). When interpreting the meaning of a statute the Court must first look to the plain language of the statute. *Brinkerhoff v. Brinkerhoff*, 945 P.2d 113, 116 (Utah App. 1997) (citing *Perrine v. Kennecott Mining Corp.*, 911 P.2d 1290, 1292 (Utah 1996). When there is ambiguity in the statute's plain language, that guidance should be sought from legislative history and relevant policy consideration. *Id.*, (citing *World Peace Movement of America v. Newspaper Agency Corp.*, 879 P.2d, 253, 259 (Utah 1994). Summary judgment is only appropriate "when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." *Wilcox v. Anchor Waste Co.*, 164 P.3d 353, 356 (Utah 2007) (other citations omitted) and Utah R.Civ.P. 56(c).

Issue No. 3 Were the trial court's compounded errors harmful to the Petitioner's claims?

Standard of Review: Utah trial and appellate courts are mandated not to disturb a judgment unless it is clear that refusing to do so would be substantially unjust. Utah R. Civ. P 61. ("... no error or defect in any ruling ... is ground for ... disturbing a judgment ..., unless refusal to take such action appears to the court inconsistent with substantial justice.") *See also* Norman H. Jackson, *Utah Standards of Appellate Review - Revised 1.*

But individual legal determinations of evidentiary rulings are reviewed under a correction-of-error standard (*cf.* abuse-of-discretion) and trial court's "selection, interpretation, and application" of a particular rule of evidence is reviewed for correctness. *Dalebout v. Union Pac. R.R. Co.*, 980 P.2d 1194 (Utah Ct. App. 1999). Finally, no evidentiary challenge will be successful without also showing that an error was harmful.

Issue No. 4: Did the trial court abuse its discretion in its application of the legal standard of unjust enrichment, as set forth by the Utah Supreme Court decision in *Jeffs v. Stubbs* 970 P.2d 1234, 1248 (Utah 1998)?

Standard of Review: The trial court is bound to follow Utah law and precedent. The trial court's conclusions of law in civil cases are reviewed for correctness. *Orton v. Carter*, 970 P.2d 1254, 1256 (Utah 1998). As used by this Appellate Court, correctness means that no particular deference is given to a trial court's ruling on questions of law. *State v. Pena*, 869 P.2d 932, 936 (Utah 1994). In reviewing discretionary rulings, the appellant must show the trial court exceeded the measure of discretion allotted or boundaries set by principles or rules of law. *See generally Pena*, at 936-939. In applying a legal rule to the facts the trial court is afforded "little room to roam" in the pasture of discretion and in essence is reviewed under a "de novo" standard. *Id.*

Issue No. 5: Although the trial court found Petitioner had proven unjust enrichment as a matter of law, was its award of damages to the Petitioner arbitrary and

capricious?

Standard of Review: When challenging discretionary rulings, the appellant must show the trial court exceeded the measure of discretion allotted by showing the court engaged in an arbitrary and capricious action. *Kunzler v. O'Dell, 855 P.2d 270, 275 (Utah Ct. App. 1993).* A trial court has abused its discretion if there is "no reasonable basis for the decision." *Crookston v. Fire Ins. Exch.*, 860 P.2d 937, 938 (Utah 1993). Reversal is appropriate when the decision is so unreasonable it is arbitrary and capricious. *Kunzler*, at 275. A finding of fact will be judged clearly erroneous if it violates the standard set by the Appellate Court, is against the clear weight of evidence, or the reviewing court is left with "a definite and firm conviction that a mistake has been made," although there is evidence to support the finding. *Cummings v. Cummings*, 821 P.2d 472, 476 (Utah Court App. 1991). The trial court must make sufficiently detailed findings on each factor to ensure the trial court's discretionary determination was rationally based upon the applicable factors. *Williamson v. Williamson*, 983 P.2d 1103 (Utah App. 1999).

Issue No. 6: Did the trial court err in its legal conclusion that Petitioner failed to establish the elements of equitable property division theories, including promissory estoppel, implied contract, and constructive trust?

Standard of Review: Legal conclusions are reviewed for correctness and "correctness" means the appellate court decides the matter for itself and does not defer in any degree to the trial judges determinations of law." *State v. Pena*, 869 P.2d 932, 935

(Utah 1996). The trial court must make sufficiently detailed findings on each factor to ensure the trial court's discretionary determination was rationally based upon the applicable factors. *Williamson v. Williamson*, 983 P.2d 1103 (Utah App. 1999).

DETERMINATIVE CONSTITUTIONAL PROVISIONS, STATUTES, ORDINANCES, AND RULES

Appellant sets forth in the attached Addendum the complete Code and Rule provisions, referenced as follows:

(1) Utah Code Annotated §30-1-4.5 (1953, as amended), common law marriage statute.

(2) Rule 56(c) Utah Rules of Civil Procedure, summary judgment.

(3) Rule 26(c) Utah Rules of Civil Procedure, discovery protective orders.

STATEMENT OF THE CASE

This is an appeal from a final judgment and order of the Third District Court, in and for Salt Lake County, State of Utah, involving initial claims under common law marriage and paternity. The parties separated on or about September 1, 2005, after having lived together over 10 years. At the time of trial, they had a 12-year-old daughter. The cohabitation was in the home of Ms. Diana Brown, Respondent, and she owned the home separately from 1989 to 1995, when the parties began living together. In 1991, Respondent divorced and paid her first husband $11,000 as his equity. She refused to marry Mr. Richards, Petitioner, despite his attempts to formalize the relationship. The Petitioner paid one-half the mortgage, household expenses, and child costs throughout the relationship, and the parties maintained a detailed accounting of these matters. In his Petition, Mr. Richards alleged a common law marriage existed and asserted additional claims for paternity and equitable division of property, including equity in the home.

A Memorandum Decision re Partial Summary Judgment was entered by the trial court on January 8, 2008. This decision held that the Petitioner's failure to file his Petition within one year of termination of the common law marriage was jurisdictional and barred his claim. Without taking any evidence, the court concluded that the parties' relationship terminated on the date Mr. Richards moved out of Ms. Brown's home.

The trial court made a fatal error in granting summary judgment for the Respondent. In light of the plain language of the statute the court could not grant

summary judgment as a matter of law because the law required evidence to establish "termination of the relationship" and not just the date that Petitioner vacated the shared residence. In addition, the court refused to take evidence regarding the disputed fact of when the "termination of the relationship" actually occurred and therefore, the court could not grand summary judgment at all. This error by the court warrants reversal because it was arbitrary, capricious, substantial, prejudicial, and prevented Petitioner from a full and fair trial.

The Petitioner was thereafter limited only to his claims for paternity and equitable theories of recovery at trial. A trial was held June 16, 2008, and on July 9, 2008, the trial court entered its own Findings of Fact, Conclusions of Law, and Order, which is the final judgment and order being appealed to this Court. In its ruling, the trial court concluded that Petitioner was entitled to compensation of $10,136 for improvements to Respondent's home that he paid for under the theory of unjust enrichment, but the trial court deemed compensation for his contribution to the mortgage over 10 years, which was a stipulated sum of $71,100, as not meeting the standard of unjust enrichment, promissory estoppel, constructive trust or implied contract. The trial court limited the evidence presented at trial to equitable theories of recovery and refused to allow direct evidence of common law marriage. Nevertheless, by the end of the trial, the court stated that the parties had met the elements of common law marriage. (Transcript, p. 183). Such a conclusion by the trial court underscores the weakness of the ruling and supports the

Petitioner's request for reversal.

STATEMENT OF FACTS

1. These parties were never married and have one (1) child together, namely Stephanie A. Brown-Richards (DOB 03-29-1996), age 12 at the time of trial.

2. It is undisputed that the parties began living together in May 1995 and Petitioner moved into a separate residence at the end of August 2005. (Tr. 14) During this 10-year period, the parties resided in the home of Diana Brown at 459 - 12th Avenue, Salt Lake City, Utah.

3. The Respondent, Ms. Brown, alleges that the parties had an exclusive romantic relationship through at least the summer of 2001. Petitioner Steve Richards alleges the parties continued an exclusive monogamous relationship and common law marriage through December 31, 2005, and he filed a paternity and common law marriage action December 21, 2006. (Record p.1).

4. It is undisputed that while they lived together, the parties shared in the payment of the mortgage expense of the residence and in division of monthly bills. The parties faithfully accounted for their joint expenses and the joint trial exhibits contained a sample of the monthly statements documenting specific expenses for mortgage payments, utilities, groceries, clothes, taxes, home repair and all home and family expenses shared by the parties over 10 years. (Joint Trial Exhibit 11-A)

5. During the 10-year relationship, Mr. Richards was the only person who

drove and owned a vehicle. He provided all the transportation for Ms. Brown and the child as needed, and paid all costs of the vehicle purchase and operating expenses. (Joint Trial Exhibit 15).

6. It is undisputed that the parties established a joint parenting relationship with their daughter and both contributed equally to her expenses, and shared in all aspects of her care taking and parental matters. The parties agreed to abide by the Petitioner's proposed "Parenting Plan," to which they stipulated as a final order at trial to resolve the paternity and custody claims. The Parenting Plan continues the parties' obligation to share equally in the child's direct expenses, and grants the parties joint legal and physical custody of the minor child and an equal division of time (R. 17-22, 58-61).

7. The parties referred to their relationship as a "marriage" and such was recognized by third parties. The IHC Employee newsletter of May 2005 had a cover photo of Ms. Brown, Mr. Richards, and their daughter Stephanie, referencing "Diana Brown and her husband Steve Richards." (Joint Trial Exhibit 7). Upon separating, Ms. Brown wrote a letter to family and friends referencing the end of their "marriage." (Diana Brown Testimony Transcript p. 90; Joint Trial Exhibit 8).

8. By the end of the trial, even the court was convinced that the parties had met the elements of a common law marriage, and stated "... by both of their testimonies, so the undisputed testimony is that the parties treated themselves, irrespective of whether or not there is a common law marriage, which I have found there is not, for reasons that

have nothing to do with the substance of the matter, but they certainly held themselves out that way by the evidence that I have in front of me." (Tr. 183)

9. Upon separation, the parties attended the class for divorcing parents and attended mediation with Marcie Keck, where they reached agreement on parenting terms and finances for their child. (Tr., 21, 123). They scheduled additional mediation sessions to address financial and property issues, but Ms. Brown cancelled these sessions (Tr. 21, 22). The trial court found as follows: "Petitioner testified credibly that he did not immediately file his Petition because he was expecting that the parties would engage in additional mediation with a view towards resolution or reconciliation. As a result of this delay, the Petition was not filed until December 21, 2006, more than a year after Petitioner had moved out of the residence." (Findings, para 4).

10. Mr. Richards asked Ms. Brown to marry him several times (Tr.19). She refused, as she had recently been divorced from Derek Priest in September 1991. (Divorce Decree, Joint Trial Exhibit 12). Yet, it seemed important to Ms. Brown that she appear to be married for the sake of the child. (Tr. 21)

11. In the divorce of Ms. Brown from Mr. Priest, she was awarded the home at 459 - 12th Avenue and agreed to pay Mr. Priest $11,800 for his equity. (Tr. 52)

12. In the common law marriage of these parties, Ms. Brown stated to Mr. Richards she would treat him as she had treated Mr. Priest, by paying him equity he had earned in the home. (Diana Brown testimony, Tr. 100).

13. Ms. Brown testified that she believed payment by Mr. Richards towards the mortgage was essentially the same as paying equity. (Tr. 98).

14. During the ten (10) years they lived together, the parties were both employed in the healthcare field, earning substantially similar incomes. The Financial Declarations filed in the case showed Mr. Richards earned $6,131 gross monthly with IHC in June 2007, and Ms. Brown earned $5,767 gross monthly as an R.N. in July 2007. (Joint Trial Exhibits 10, 16).

15. Mr. Richards alleges that during the relationship of the parties, Ms. Brown stated he was entitled to a financial interest in the home and would be added to the title, although she never did so. Ms. Brown acknowledged at trial, as found by the trial court, that she made statements over the years that (1) referenced how she had dealt with her ex-husband by giving him one-half the equity in the home, (2) that she would treat Mr. Richards equitably, and (3) that she would be willing to put Mr. Richards on the title to the house. She testified that those statements were always subject to having Mr. Richards first pay her for one-half of her equity in the home. (Diana Brown Testimony Tr. 97-98). Mr. Richards disputed this testimony, saying he had "no recollection" of there being a pre-condition that he pay one-half of the equity in the house before his name could go on the title. (Steve Richards Tr. 36, 41). Ms. Brown acknowledged she was aware it was important to Mr. Richards to have his name on the title and that he periodically raised this issue. Although Ms. Brown pointed to the two (2) refinances of the home as evidence

that Mr. Richards had opportunity to arrange "to pay her for her equity," had he chosen to do so, she also acknowledged that she never identified for Mr. Richards a specific amount of money that would satisfy her in order to get his name on the title. (Diana Brown Tr. 99). She also acknowledged that she never seriously pursued any efforts to put Mr. Richards on the title. The trial court stated: "The court finds the testimony of Petitioner [Richards] to be more credible than that of Respondent [Brown] on the issue of Respondent's representations to Petitioner that she would treat him equitably [on the issue of his interest in the home] if they ever separated. Petitioner had never been married, whereas Respondent had been through a divorce and a property division previously. Respondent therefore had a greater understanding of what a 'split' between them would entail with respect to any distribution of property." (trial court Findings, para 20).

16. There was no dispute as to the accounting established at trial that Mr. Richards paid Ms. Brown $71,100 specifically towards the mortgage during the 10-year relationship, and that his investment in repairs and improvements was approximately $12,470. (Testimony of Diana Brown, Tr. 96, testimony of Mr. Richards Tr. 25, Joint Trial Exhibits 5,6).

17. The parties obtained a joint appraisal on the 12th Avenue residence, resulting in an appraised value of $425,000 at trial. (Joint Exhibit 9, Findings, R. 238). The current mortgage balance on the marital residence was approximately $148,000, resulting in total equity of $275,000. (Joint Trial Exhibit, 9-A, 9-B) The residence was

purchased December 1989 by Ms. Brown, thus the parties shared the residence for approximately 66% of the total ownership term. Applied to the equity, this represents $183,315 in equity accumulated during the cohabitation of the parties. An equal division would be $91,658 to each party. (Tr. 155-156)

18. Ms. Brown asserted that she viewed Mr. Richards as a "tenant" for part of their 10 year cohabitation. (Tr. 104-105)

19. The trial court found no evidence of a rental agreement between the parties. The Court found Ms. Brown never had a lease with Mr. Richards, never declared the mortgage contribution as rental income on taxes, never referred to him as a "tenant." On the contrary, the trial court found undisputed evidence that during their time together the parties viewed themselves as a "family" and presented themselves to co-workers and associates as "husband and wife," even after their intimate relationship terminated. (Tr. 183).

20. In the litigation, Mr. Richards requested a finding of common law marriage, and Ms. Brown filed a Motion for Summary Judgment, stating the claim was untimely. The trial court issued a Memorandum Decision finding that the claim failed, as it was not filed within the jurisdictional requirements of the common law marriage statute, which requires a filing within one (1) year of "termination" of the relationship. The trial court based its decision solely on the finding that cohabitation ended August 31, 2005, not on any more probative analysis of when the common law relationship

terminated under the statute. (Memorandum Decision, R. 121) The trial court also limited evidence and argument on the elements of common law marriage at trial. (Memorandum Decision, R. 121)

21. Mr. Richards filed his Verified Petition December 21, 2006, and alleged the parties' relationship ended December 31, 2005, when the parties ceased holding themselves out as married, began to date others, and were no longer living together. Until that time, they continued sharing holidays, he kept a key to the house and entered as needed, the parties remained monogamous, and nothing changed as to joint parenting and support of the child. Mr. Richards also retained Ms. Brown as beneficiary on his life insurance and retirement accounts after separation. (Findings, para 14) (Tr. 16-18).

22. The Verified Petition filed by Mr. Richards pled common law marriage, as well as alternate equitable theories of recovery and property division, including implied contract, unjust enrichment, contract for services, partnership or constructive trust. (R.1-8)

23. The trial court concluded as a matter of law that Mr. Richards had stated a claim for unjust enrichment. The court ordered Ms. Brown to reimburse to Mr. Richards the expenditures he made for a deck, swamp cooler, sprinkler system, and ceiling fan in the amount of $10,136. (Findings, para 34) The Court denied any other categories of expenditure, including the $71,100 paid towards the mortgage during the 10-year period, any expenditure towards home maintenance, a total of $12,470, including part of the deck

cost, lawn service costs of $1,024.50, and other repairs. (Tr. 146, Joint Exhibit 6). Mr. Richards also quantified the costs incurred by him to purchase, insure and maintain the only automobile used by the parties during the 10-year relationship, in the amount of $38,565, and he requested reimbursement of half the expenditure. (Joint Exhibit 15, Findings, para 35-39).

24. The trial court reasoned that home maintenance expenses, such as lawn care, do not "add value" to the home and the Court could thus not determine how these expenses conferred a specific benefit on Ms. Brown, as required for a finding of unjust enrichment. (Findings, para 35).

25. The Court denied Mr. Richards' request for reimbursement for contributions to the home mortgage on the theory that he would have incurred a housing expense elsewhere, whether as rent or mortgage payment, if he had not been living with Ms. Brown. The Judge reasoned that he would have had to make at least a comparable payment for rent, although she calculates the fair rental value of the home as approximately what he currently paid as mortgage, $650 per month. The court reasoned that there was a failure of proof on this element of the unjust enrichment damages because Mr. Richards provided no evidence that he had financial wherewithal to pay a down payment or secure a mortgage solely in his name and, thus, the court could not conclude he was in a financial position to have been able to accrue equity, but for having been misled by Ms. Brown that he was accruing equity. This finding was made despite

the evidence in the Financial Declarations that they earned similar incomes. The court thus failed to reimburse Mr. Richards any of the $71,100 that he proved were direct contributions to the mortgage during his cohabitation with Ms. Brown. (Findings, para 36-40)

26. The court considered and rejected Mr. Richards' other theories for recovery: Promissory estoppel, contract and constructive trust. The Judge based her reasoning on what Mr. Richards did not do: He did not establish that his actions in failing to establish a more formal equity interest in the property were "prudent," and thus failed by a preponderance of the evidence to establish the elements of promissory estoppel. (Findings para 41-42).

27. The court denied Mr. Richards any reimbursement for contributions he made to the relationship by allowing full use of his vehicle over a period of 10 years without reimbursement. The court found he had failed to prove by a preponderance of evidence that Ms. Brown received a measurable and particularized benefit through occasional use of the vehicle, and could not find unjust enrichment. (Findings para 43)

28. The court found Mr. Richards had no basis to assert a claim for attorney's fees and denied that request. (Findings, para 44).

SUMMARY OF ARGUMENT

1. The trial court erred in its analysis of what constitutes "termination of relationship" under the Utah Common Law Marriage statute. That statute requires parties

to meet the significant burden of establishing five (5) separate factors. Once established, a common law marriage is treated for all intents and purposes as a marriage, and divorce law is applicable upon the end of that relationship. The court herein treated as dispositive, only one (1) of the five (5) factors, that is, the factor of ending living together, and deemed that as termination of the relationship. There is no statutory or legal precedent for this finding, which was made pursuant to a summary judgment motion brought before the Commissioner. The court thereafter limited trial evidence and discovery. Importantly, the court was nonetheless convinced that there was a common law marriage in this case and makes this reference in the trial transcript. On this point the parties' testimony was consistent, all exhibits were stipulated including documentation that the parties had established a general reputation as married, and used that terminology towards one another. Mr. Richards alleges that his moving out of the marital home should be deemed a separation, as he was hopeful of reconciliation and the parties were jointly engaged in mediation efforts. Mr. Richards testified that he was totally unaware that there was a one(1) year limitation triggered by his voluntary move from the marital residence. Mr. Richards proposes that the Court take a more probative and case-by-case analysis of what constitutes a termination, given his strong claim to a common law marriage, his good faith and prudent efforts towards reconciliation and resolving disputes without litigation, and principles of equity and fairness.

2. The trial court found Mr. Richards entitled to reimbursement of $10,136

for improvements he made to the residence of Ms. Brown. This was reimbursement for a deck, swamp cooler, sprinkler system, and ceiling fan. The court made this award based on a finding that these payments represented unjust enrichment of Ms. Brown. However, the court denied other categories of expenditures, including the undisputed payment of $71,100 towards the mortgage during the 10-year period, and $12,470 towards home maintenance and other repairs, stating only that these were to maintain the home and did not "add value." It is impossible to rationalize the theory of the court in distinguishing these categories of reimbursement. Her analysis that Mr. Richards should not be reimbursed any portion of the equity because he did not show that he had actually applied, or could qualify for a mortgage to refinance, makes no sense. This is especially hard to understand, in light of the evidence that the parties made substantially equal incomes in the health care field, and by the court's own explicit findings that there was not a landlord/tenant arrangement; rather, that there was a marriage-like arrangement and that Mr. Richards' testimony was more credible on the issue of Ms. Brown's representations to him that she would treat him equitably on the issue of interest in the home if they ever separated, and using as an example how she had treated her prior husband by paying out equity upon separation.

3. The court erred in denying any relief based on the theory of promissory estoppel, denying Mr. Richards' other equitable claims. All elements of promissory estoppel were proven in this case, and the court's conclusions of law contradict her

explicit findings of fact, which support application of this theory. Specifically, the court found that Mr. Richards had not acted with prudence and in reasonable reliance on the alleged promise that Ms. Brown would put his name on the title to the home without any preconditions. She also stated that he had not shown his reliance resulted in a loss to him. These conclusions are directly contrary to the court's findings, which supported the theory of unjust enrichment, in that he had added value to the home, which is conferring a benefit to Ms. Brown, and it would be inequitable not to compensate him. It is also contradictory to the court's finding that Petitioner's testimony was credible and that Ms. Brown's testimony was not credible, that she intended to, but never got around to adding him to the title, and that she was not explicit about the precondition of equity.

ARGUMENT

I. THE TRIAL COURT ERRED AS A MATTER OF LAW IN ITS ANALYSIS OF WHAT CONSTITUTES "TERMINATION OF THE RELATIONSHIP" UNDER THE COMMON LAW MARRIAGE STATUTE.

A. The Court Erred As A Matter of Law When It Ignored the Plain Language Of The Statute And Granted Summary Judgment To Respondent And Dismissed The Petitioner's Common Law Marriage Claim.

The court erred as a matter of law when it granted summary judgment to the Petitioner on the issue of common law marriage. Summary judgment is only appropriate when there is no genuine issue as to any material fact and the moving party would be entitled to a judgment as a matter of law. *Wilcox v. Anchor Waste Company*, 164 p.3d 353, 357 (Utah 2007). Addendum, Rule 56 U.R.Civ.P. In this case there was no precedent

to find that a common law marriage ended solely when living together ended. The end of cohabitation as defined in Utah law is also disputed factually and thus is not a proper subject for summary judgment.

The trial court ruled that the relationship between Diana Brown and Steve Richards terminated at the end of cohabitation and further found that the end of cohabitation was marked as the date that Mr. Richards voluntarily vacated the marital residence. In essence, the trial court ignored the plain language of the statute and instead elected to elevate one of the five elements required to establish a common law marriage, that of cohabitation, into a dispositive element; and, despite disputed material facts, concluded that the parties' relationship had terminated and that the Petitioner's filing was untimely. The Court referred to its decision as "jurisdictional" but failed to explain the reasons supporting the jurisdictional conclusion. This was a fatal error. Moreover, this conclusion was contrary to the court's findings at trial. At trial, the court found credible Mr. Richard's testimony that after he vacated the residence, he still believed the parties would resolve matters or reconcile (Findings, para. 4); and further found that even after the parties' intimate relationship had terminated, the parties continued to view themselves as a family and continued to present themselves to their co-workers and associates as "husband" and "wife" (Findings of Fact, R. 233). Therefore, the Court's jurisdictional conclusion is unsupported by the plain language of the statute and is against the clear weight of evidence included in the findings, and it is proper for the reviewing court to

determine that such a conclusion is wrong as a matter or law or presents a definite and firm conviction that a mistake has been made.

Marshalling the evidence:

There is no evidence to marshal re: the Court's conclusion that there was no common law marriage. The trial court erred as a matter of law when it ignored the plain language of the statute and relied on its own determination of "termination of the relationship" as the date the Petitioner vacated the parties' shared residence and granted summary judgment to the Respondent. January 9, 2008 Memorandum Decision (Record: 121 - 127). In that decision, the Court affirmed the recommendation entered by the Commissioner and concluded that under UCA 30-1-4.5(2) the determination or establishment of a marriage under this section must occur within one year after Mr. Richards voluntarily vacated the shared residence in August 2005 and therefore he did not timely file his petition and any consideration of a common law marriage was barred in this case. In affirming the recommendation of the commissioner, the court took no additional evidence on the disputed fact of when the "termination of the relationship" occurred and the court took no additional evidence at trial.

Utah law requires that the determination or establishment of a common law marriage must occur either during the relationship or within one year following the *termination of that relationship*. UCA § 30-1-4.5(2). Subsection (2) does not include the word "cohabitation." Instead, cohabitation is one of the essential elements required by Utah law to establish a common law marriage but it is an issue of first impression for this Court to determine that the end of cohabitation is a dispositive factor in determining when a common law marriage has terminated. The plain language included in Utah's common law statute is *termination of the relationship* and not the end of cohabitation. The Court's use of cohabitation as a dispositive factor is contrary to the plain meaning of the statute and was an error of law.

In this matter, the date that the relationship terminated is a disputed fact. The court ruled that the parties 10-year period of cohabitation terminated at the end of the parties' period of living together, that is, when the Respondent vacated the marital residence. Cohabitation as defined in Utah case law and statutes requires living together with sexual contact and elements of marriage like behavior such as unrestricted access to a shared home and sharing of expenses. *Haddow v. Haddow*, 707 P.2d 669 (Utah 1985). The trial court found that it was undisputed that sexual contact between the parties terminated in 2001 (Memorandum Decision, Record at 122) and that the parties physically separated at the end of August, 2005 (*Id.*). However, the parties greatly disputed when the end of the relationship occurred. The court also found that Mr. Richards testified credibly that the failure to file his Petition was due to his sincere belief that the parties might reconcile and Ms. Brown's repeated cancellation of mediation. (Findings, para 4, Record at 229). The record shows the parties continued most aspects of their relationship as usual even after ceasing living together - celebrating holidays through Christmas 2005, sharing expenses, staying monogamous. Most notably, at trial the Court also found that "the undisputed evidence at trial was that throughout their time together Petitioner and Respondent viewed themselves as a 'family' and presented themselves to their co-workers and associates as 'husband' and 'wife' even after their intimate relationship had terminated." (Findings, Record at 233, (citing Joint Trial Exhibits 7 and 8).

Utah law is clear that there are five essential elements required to prove a common

law marriage. There is no precedent, at least that counsel could find, that determines when or which of the five (5) factors individually or collectively establishes a common law divorce. The Appellant submits that a fair reading and application of the statute is to allow a party to establish termination on a case-by-case basis, using the statutory factors as reference. Certainly the marriage should end on mutual agreement or when the ability to consent ends, such as by formal marriage. Otherwise, Appellant submits a trial judge should consider each case presented as to whether the factors which established the common law status have unraveled to change the fundamental nature of the relationship to be other than one akin to marriage. There may thus be a combination of elements as in this case, where the parties were not living together, yet there was no change to their monogamy, access to home, co-parenting, financial arrangements such as beneficiary status, transportation and sharing of most expenses. Thus the marital conduct and holding out as married continued even though living together had ceased. Given the hope of reconciliation and mediation efforts - the separation could have been temporary - it is inequitable to start a statute of limitations clock ticking solely based on a separation date. This certainly frustrates the strong State policy to support marriage and to explore every avenue to keep families intact and to preserve marital status.

There is no statutory or legal precedent requiring one factor be dispositive in determining that the relationship has terminated. The importance of such a fair reading and application is evident in this case: In a 10-year common law marriage, as established

by these parties, people married under the common law statute should have the same right to separate, to consider reconciliation, to freely negotiate and mediate as formally married people, and without fear that a separation triggers an invisible statutory clock to bar claims to a standard division of property accumulated together. In this case, Mr. Richards did everything possible to protect his interests. He asked for Ms. Brown's hand in marriage. After the parties separated, he relocated six blocks from home to continue his familial role. He had a key to the home and entered without restriction on his access. (Tr. 16) The family continued to spend holidays and special occasions together through Thanksgiving and Christmas, 2005. (Tr. 92) He took affirmative action to protect his legal interests by attending the divorce education class, engaging in mediation with Marcie Keck in August 2005, and believing there was a possibility of reconciliation he relied upon Ms. Brown's representation that she would return to mediation until December 2005. (Tr. 21-22) As a matter of fact up to and including December 2005, Ms. Brown continued to represent the parties as husband and wife. Although the parties may have ceased engaging in sexual relations in 2001, the exclusive nature of their relationship lasted at least through December, 2005.

Under the case of *Hansen v. Hansen,* 958 P.2d 931 (Utah App. 1998), no single factor is determinative to establish a common law marriage and as such, no single factor should be determinative to establish the termination date of such marriage, or the termination of the common law relationship. The very recent case of *In Re Marriage of*

Kunz is also most instructive. *In Re Marriage of Kunz*, 136 P.3d 1278 (Utah App 2006). That case involved individuals following the doctrine of plural marriage where the Husband, who had married a woman named Janice in a civil ceremony, divorced her, but then continued to act married by holding property together, raising children, having conjugal relations despite having conjugal relations with other women and a subsequent civil marriage. The court found that there was no longer a common law marriage with Husband and Janice despite their lengthy relationship of 50 years acting married, due to the existence of the subsequent marriage license and the fact that Husband was thus no longer capable of giving consent. Therefore, the common law marriage in *Kunz* ended not because there was no cohabitation and not because there were multiple sex partners, but because the Husband no longer had the ability to consent to the unsolemnized marriage after he entered into his civil marriage. The issue of cohabitation and multiple relationships was not a dispositive factor, nor was it even a decisive fact in the analysis at any stage.

At the end of the day, Mr. Richards acted prudently and in good faith to address the demise of the relationship, including engaging in mediation and trying not to make the process more adversarial by taking the Respondent to court. Moreover, but for the court's ruling on the common law marriage, there would be no dispute as to his equity in the marital residence and Mr. Richards would also have had a right to a fair and equitable division of the retirement assets. It is significant in this case that the parties had a

common law marriage, as stated by the court. (Tr. 183). There was ample evidence of shared expenses, merging of finances, successful co-parenting, holding out to third parties and acquiring a reputation as married. Mr. Richards clearly wanted to be married and made the request of Petitioner several times.

Mr. Richards had no knowledge of the one-year filing requirement and certainly no advance knowledge that the court deemed the end of living together a triggering event. As such, Mr. Richards has been denied a basic right to have his property claims adjudicated properly by the court, which is unfair. He is entitled to have a court examine his unique situation to assess when the common law relationship terminated.

There is no Utah case law to indicate that the change of any single essential element of a common law marriage, with the exception of consent, is sufficient to terminate the marriage. Rather the statute's plain language requires a broader analysis of how the parties established their relationship and when that relationship terminated. As such the trial court erred in not taking any evidence on the disputed and material fact of determining when this relationship terminated. Based on these substantive and prejudicial errors, the trial court should be reversed and this matter remanded for additional consideration of Mr. Richard's legal remedies for equity in the martial residence and Ms. Brown's retirement.

B. The Court Should Have Taken Evidence Regarding Common Law Marriage And Should Have Found Petitioner Entitled To That Status.

The court erred in granting summary judgment against the Petitioner on the issue

of common law marriage. The trial court never took evidence on the disputed fact as to when the relationship terminated; rather, the trial court merely affirmed the ruling entered by the Commissioner that the Petitioner's claim for common law marriage failed because it was not filed within one (1) year of the relationship termination, determined only by the date that the Petitioner voluntarily separated and vacated the residence. The court took no additional evidence to review the Commissioner's ruling, and the court refused any additional evidence at trial. Nevertheless, all the Exhibits were stipulated and entered into the record, which conclusively established a common law marriage. The court admitted the same at trial:

> *"the undisputed testimony is that the parties treated themselves, irrespective of whether of not there is a common law marriage, which I've found there isn't for reasons that have nothing to do with the substance of the matter but they certainly held themselves out that way by the evidence that I have in front of me."* (Tr. 183).

This is a case where the parties clearly had a common law marriage which is recognized even with the evidentiary limitations because the evidence was overwhelmingly consistent and compelling. The problem is that Mr. Richards, based on the court's errors, was not then entitled to a common law divorce and suffers significant financial loss as a result. The evidence of common law marriage was so strong that reviewing the evidence leads to a definite and firm conviction that a mistake was made.

Usually, the most difficult element to establish is that the parties are holding themselves out to the community as a married couple; but, in this case, the record holds

ample evidence of such conduct including the IHC newsletter dated May 11, 2005, with a family photo and text which states "Diana (Brown) is shown above with her husband Steve Richards, and daughter Stephanie Richards." (Joint Trial Exhibits No. 7). Additionally, Exhibit No. 8 was a letter drafted by Ms. Brown in December 2005 and sent to family and friends of the parties informing them of the parties' separation, which states as follows: "The decision to separate was made after much effort was put into our marriage... the research is very clear that children of divorce..." (Joint Trial Exhibits No. 8). These direct statements made by Ms. Brown about her "10-year marriage" to Mr. Richards are in addition to the mountain of financial evidence admitted at trial that Mr. Richards contributed equally based on a monthly invoice, regular payments to the home mortgage, utilities, child expenses, etc.. Indeed, the parties were both registered nurses, earning substantially equal incomes, at the time of separation and who had adjusted financial contributions to support their joint needs many times during the relationship, as any married couple would do. For example, during the 10 years, only Mr. Richards had a car and he paid all costs related to car transportation for the family. The parties also allocated tax exemptions and status to maximize financial returns, which were shared. (Tr. 39-40, 97). Moreover, despite denying the Petitioner's Objection to the Commissioner's recommendation granting the Respondent's Motion for Summary Judgment, the court is frustrated by the overwhelming evidence of the common law relationship between these parties. This Court in *Hansen v. Hansen,* 958 P.2d 931 (Utah

App. 1998) has held that the standard to establish a common law marriage is by preponderance of evidence. Similarly, the case of *State of Utah v Green*, 99 P.3d 820 (Utah 2004) involved the polygamist Tom Green and the State's effort to prove the existence of a valid common law marriage between he and one of his plural wives, Linda Kunz, so he could be prosecuted for bigamy. The trial court found a valid marriage which was upheld by the Supreme Court, when Mr. Green resided in a mobile home which was grouped together with other trailers where various women and children lived whom he considered his family members and visited on a rotating basis. The court found this arrangement to meet the statutory definition of common law marriage in Utah despite the unusual cohabitation and conjugal arrangements. Under this precedent, the Petitioner has met his burden of proof to establish that his common law marriage existed and the court erred to not so find.

C. The Court Compounded Its Error When It Wrongfully Granted A Protective Order And Thus Improperly Limited The Evidence Related To The Common Law Facts As Applied To Petitioner's Claims And Equitable Theories.

The court granted the Respondent's Protective Order and ordered that Ms. Brown need not answer certain discovery; specifically, admissions and interrogatories related to what Ms. Brown believed to be common law marriage facts. That ruling therefore biased and improperly limited the available evidence that Mr. Richards had to present on his equitable theories.

Respondent's argument not to respond to the challenged discovery was that it was

not relevant to the issues pending before the court, based on the court's ruling as to common law marriage and cohabitation. The Petitioner's memorandum in response argued that the court's ruling as to common law marriage settled only one (1) disputed fact, that is, the date of physical separation. That the discovery sought additional information as to the manner of acquiring property, the handling and payment of finances during the cohabitation, and other inquiries, which *also* applied to the equitable theories presented in the case of unjust enrichment, partnership, constructive trust, and implied contract. The discovery requests sought factual information relevant to these alternate theories, although it may certainly have been evidence which overlapped the common law marriage claims. Moreover, as stated in Rule 26(c) the purpose of the protective order is to protect a party from annoyance, embarrassment, oppression, or undue burden or expense. The purpose is certainly not to limit relevant evidence. The standard of relevance is extremely broad and Petitioner's discovery should not have been limited. The Utah Supreme Court, in the lead case of *State Road Commission v. Petty*, 412, P.2d 914 (Utah 1942) held that discovery was to be liberally permitted where it is used to eliminate noncontroversial matters and to identify, narrow, and clarify the issues on which proof may be necessary. Rather than heeding that precedent, the trial court issued a Minute Entry, which granted the Respondent's Motion for Protective Order (R. 193-195). As such, Petitioner was significantly hampered in his presentation of complete evidence to the trial court, even in presenting theories of unjust enrichment and promissory

estoppel, theories which the court ultimately found relevant and applicable to this situation.

II. THE TRIAL COURT FAILED TO FOLLOW THE LEGAL STANDARD OF UNJUST ENRICHMENT AS STATED BY THE UTAH SUPREME COURT IN *JEFFS V. STUBBS.*

To state a claim for unjust enrichment in Utah, a Petitioner must establish facts supporting three elements:

1) *A benefit conferred upon one person by another;*

2) *An appreciation or knowledge by the conferee of the benefits;*

3) *The acceptance or retention of the benefit under such circumstances as to make it inequitable for the conferee to retain the benefit without payment of its value.*

Jeffs v. Stubbs, 970 P.2d 1234, 1248 (Utah 1998) Thus, unjust enrichment occurs when a person has and retains money or benefits that in justice and equity belong to another. In discussing this theory, the Court of Appeals stated "by it's very nature, the unjust enrichment doctrine developed to handle fact situations that did not fit within a particular legal standard but which nonetheless merited judicial intervention." 970 P.2d 1245. The Court further stated "unjust enrichment law developed to remedy injustice when other areas of the law could not. Unjust enrichment must remain a flexible and workable doctrine. Therefore we afford broad discretion to the trial court in its application of unjust enrichment law to the facts." 970 P2.d 1245.

In the *Jeffs* case, the Utah Supreme Court upheld a finding of unjust enrichment and constructive trust. *Id.* That case involved a dispute over occupancy of land between 21 individuals who are part of a polygamist community who built improvements on land owned by the United Effort Plan Trust (the UEP). After trial, the court relied on an unjust enrichment theory to hold that claimants were entitled to occupy the UEP land during their lifetimes or to receive compensation for the improvements they made. In this case the UEP invited members to build their homes on assigned lots representing that they could live on the land permanently and that having a home there was "better than having a deed". In 1986, Rulon Jeffs declared that all those living on UEP land were tenants at will which led to the filing of the legal action claiming UEP had been unjustly enriched by the improvements made by the tenants. The court held that unjust enrichment applied and imposed a constructive trust in favor of the claimants.

Marshalling the evidence:

The trial court focused on what the Petitioner didn't do during the relationship rather than applying the test to the evidence of what he did do.

1. The court found that Petitioner never took steps to clarify his position or secure his interest in the marital residence. For example, the court found that Ms. Brown refinanced the home on two (2) occasions: the first was January 2001 when Ms. Brown removed $40,128.29 in equity from the property; and the second was June 2004 when Ms. Brown removed $25,000 in equity from the property; and the court found no evidence that Mr. Richards shared in those equity withdrawals. Findings, Record at 234. In addition, Ms. Brown testified that her promises and representations to Mr. Richards regarding treating him equitably and putting him on his title were conditioned upon his having to first pay her for one-half the equity in the home. Findings, Record at 235. While the court specifically did *not* find Ms. Brown's testimony regarding her conditions

to be credible, the court found the Mr. Richards knowingly accepted his financial contributions to permanently improve the home but mistakenly believed that in making such contributions he was accumulating an equity interest in the home. Findings, Record at 236-237. Specifically, the court found several steps that Mr. Richards failed to take including that he failed to have the home appraised...he failed to initiate any contacts with any banks or mortgage companies to explore what would be involved in arranging for a transfer of title to joint tenancy, co-tenancy, or some other means for securing his interest...and he failed to capitalize on Ms. Brown's decision to refinance the home on two separate occasions and to take those opportunities to resolve his concerns one way or another. Findings of Fact, Conclusions of Law and Order, Record at 237.

2. Although the court acknowledged all Exhibits were stipulated, as to Mr. Richards mortgage and maintenance contributions the court found many of the checks unclear as to whether they were household improvements or other expenses not related to an improvement to the house. Findings, Record at 239, "Although Respondent does not challenge this evidence of payments by Petitioner, in most cases the court cannot discern from the exhibit whether those expenses were incurred for household improvements, or simply involved other expenses that are not related to an improvement to the house (e.g. check #438 for $30 with a "memo" note of "bed delivery")." Findings, Record at 239. Because there was at least one check included in Exhibit 6-B that did not appear to be for a home improvement (check 438 with "memo" for "bed delivery") Mr. Richards failed to meet the preponderance of evidence standard to demonstrate the unlabeled and unexplained checks in that exhibit are for home improvements. Findings, Record at 240-241.

3. The court states the claim for unjust enrichment under Utah law that a party bears the burden to establish (a) a benefit is conferred on another; (b) that receiving party had knowledge of the benefit received; and (c) under the circumstances, allowing retention of the benefit without paying for the value would be inequitable. Conclusions of Law, Record at 242. Then, applying that analysis, the court concluded Mr. Richards had paid $8,895 towards a new deck and other amounts such as the $750 Mr. Richards expended for the purchase and installation of a swamp cooler, $312 towards a lawn sprinkler system, and $179 for the purchase and installation of a ceiling fan and concluded it would be inequitable for Ms. Brown to retain that benefit of such improvements without reimbursement to Mr. Richards for a sum total of not less than $10,136.00. Conclusions of Law, Record at 242-243.

4. Although the court found evidence of other contributions by Mr. Richards to improvements to the house, because the court concluded Mr. Richards had failed to meet his evidentiary burden to establish those other contributions were for home

improvement rather than home maintenance, the court disallowed that evidence. Conclusions of Law, Record at 243.

5. The court acknowledged Mr. Richards' contribution of $71,100 towards the mortgage obligation but concluded he could recover no part of those payments because he would have had an equivalent housing expense elsewhere for rent or mortgage. Conclusions of Law, Record at 244.

6. The court found Mr. Richards failed in his burden to establish unjust enrichment on the mortgage payments because, "Petitioner provided no evidence at trial that during the time the parties were co-habiting he had the financial wherewithal either to pay a down payment on a separate residence or to secure a mortgage solely in his name." Conclusions of Law, Record: 245.

7. Diana Brown testified that she viewed Mr. Richards payment toward the mortgage as rent. Transcript, page 105.

8. Ms. Brown testified that Mr. Richards providing all the automobile transportation was not a benefit to her, just a convenience. Transcript, page 103, 104.

9. Ms. Brown testified that it was fair for her to retain all increased value in the house over ten years because Mr. Richards had not "participated in the running of the house and paying a sum to buy into the house to make it half his own so that even when they separated, it would be half his and they would have to either sell it or determine how they were going to pay each other off; and further that it would have been different if their relationship "didn't go by the wayside as it did." Transcript, page 106-107.

10. Diana Brown testified that the monthly accounting sheets she prepared was not intended to be a contract or proof Mr. Richards paid into the house equity but was "a simple declaration of where the money that we were paying out was going." Transcript p. 118.

This evidence is legally insufficient to support the trial court's Findings and Conclusions. In applying the theory of unjust enrichment to the facts in this case, the three requisite elements are readily established. First, Respondent clearly received a benefit over a period of ten years from Mr. Richards' faithful payment of half the

mortgage, contribution towards home repairs, improvements and joint arrangements on taxes. The second element is also readily established in that Respondent surely had an appreciation or knowledge of the benefits being conferred given the joint cohabitation; and the third element is Respondent's acceptance or retention of the benefit under circumstances that make it inequitable to retain the benefit without payments of its value. In this regard, Mr. Richards relied on Respondent's representation to add him to the title which prevented his making alternate investments in real property or other avenues or even in terminating the relationship at an earlier stage which may have occurred, but for the deception. Other cases where the Utah Court of Appeals upheld claims of unjust enrichment include *Shoreline Development Inc v. Utah County and American Fork City*, 835 P.2d 207 (Utah Court App. 1992). See also, *Allen v. Hall*, 148 P.3d 939 (Utah 2006).

A. The Trial Court Erred In Distinguishing Between Home Improvement And Maintenance Expenses.

The trial court held that Mr. Richards had proven his claim for unjust enrichment and awarded him $10,136 in compensation for his payment for a deck, sprinkler system, swamp cooler and ceiling fan purchased for the home of Ms. Brown. (Findings, para. 33-34) She rejected claims totaling an additional $2,334 for other home expenses, arbitrarily declaring they were mere "maintenance" and not an improvement to the home which "added value". (Findings, para. 35). This distinction is capricious, as the maintenance expenses were fully proven and analytically meet the three-prong test of unjust enrichment by:

(a) Was a benefit conferred? Yes, Mr. Richards paid for appliance repair, lawn mowing, etc.

(b) Did Ms. Brown appreciate or know of the benefit? Yes. They were living together and she shared some of these costs.

(c) Under the circumstances, is it inequitable to allow Ms. Brown to retain the benefit without payment? Would a tenant or guest pay for 10 years of maintenance? Was it a gift? No, it was done in reliance and in expectation of acquiring equity in the home and to keep it well maintained.

The trial court seemingly abandons the unjust enrichment test in its application of law to the facts to award reimbursement for some improvements and not other categories of proven expenses that meet the three-part test, without sufficient findings or explanation to support such conclusions. Although the concept of adding value is interesting, it is more applicable to a divorce action where equity and expenditures are being analyzed under divorce law and it does not fit into an unjust enrichment analysis.

Similarly, it was undisputed that Mr. Richards alone paid to purchase, insure, repair, and fuel a car which the family used. He quantified the costs over 10 years as $3,800.00 annually ($38,000.00 over 10 years) and requested reimbursement for one-half. (Tr. 57-58; Joint Trial Exhibits) As demonstrated above, this expense also meets the three-prong test of unjust enrichment and should be expenses reimbursed to Mr. Richards.

B. The Court Abused Its Discretion In Not Awarding $71,100.00 In Home Equity to Mr. Richards Under The Theory Of Unjust Enrichment.

Over the 10-year relationship, it was undisputed that Mr. Richards paid $71,100 in monthly payments towards the mortgage, and all checks were produced. (Tr. 27-28; Joint Trial Exhibit 5, 5-A). Despite this evidence, the trial court arbitrarily denied any portion of the claims as not proper under an unjust enrichment analysis. (Findings, para.36-40) Appellant will state and respond to the court's reasons below:

Reason (1): Mr. Richards could have incurred an equivalent housing expense elsewhere either as rent or mortgage. (Findings, para. 37).

Rebuttal: This reasoning is capricious because the trial court ignores the difference between rent and building equity. It is a critical distinction that allows Ms. Brown and Mr. Richards to pay the same amount over 10 years, yet one has gained a valuable investment worth $425,000 and the other has gained nothing.

Reason (2): Mr. Richards testified to his reliance on Ms. Brown's promises to put him on title and assumption that he was building equity which prevented him from investing elsewhere which the court says was not established at trial because he did not show evidence he had a down payment or could secure a mortgage solely in his name. (Findings, para. 38)

Rebuttal: This reasoning is capricious because there was evidence that the parties made equal incomes and Ms. Brown owned her own home and mortgage - evidence apparently ignored by the court. Moreover, it is entirely irrelevant that Mr.

Richards did not apply for a mortgage as he was relying on the agreement made with Mr. Brown that he was a partner in his home - testimony from Mr. Richards the court deemed credible (Findings, para. 20).

Unfortunately, the trial court again misses the point in the evidence or lack of evidence she cites to support her reasoning and therefore reaches the wrong conclusion of law. She does not even address the three prong test of unjust enrichment in considering the claims to equity arising from mortgage payments. In fact, unjust enrichment analysis *supports* an award of equity accumulated over 10 years or reimbursement of the $71,100 as follows:

(a) Was a benefit conferred? Yes. Ms. Brown paid half the mortgage yet received 100% of the benefit of full payment. Ms. Brown owns the house. Her investment has been preserved, protected and improved and increased in value over 10 years due to Mr. Richards payments.

(b) Did Ms. Brown appreciate or know of the benefit? Yes. They lived together. She made him pay half by presenting a monthly invoice to him.

(c) Under the circumstances, is it inequitable to allow Ms. Brown to retain the benefit without payment? Yes. Mr. Richards relied in good faith; he fulfilled his obligation in full; he did not make alternative investments; he remained in the relationship longer.

Again, if the trial court had applied the unjust enrichment analysis to the

undisputed evidence, Mr. Richards should have been awarded his full equity claim. The trial court ruling should thus be reversed on this point.

C. The Trial Court's Conclusions Regarding Unjust Enrichment Are Arbitrary And Contrary To Other Jurisdictions That Have Applied Unjust Enrichment To Support An Award Of Home Equity.

It is useful to review how high courts in other jurisdictions have handled the fact situation of dividing property among unmarried cohabitants by applying unjust enrichment and similar theories of division. These cases were filed with the trial court by letter dated June 13, 2008.

Tolan v. Kimball, 33 P.3d 1152 (Alaska 2001). This is a case involving cohabitants over eight years where one party purchased the home titled in their sole name and where both parties contributed to the value of the home and shared expenses. The Supreme Court of Alaska awarded the parties an equal share of the net value of the property at the time of separation based on a theory that they had an "informal, express agreement" and that the evidence showed that their investment was intended to be equal. The Court held there was no need to establish that an actual contract between the parties existed. The Court denied the assertion that the cohabitant without title to the home was only a "tenant" as there was no monthly payment shown as rent on tax returns.

Cook v. Kalinyaprak, 84 P.3d 27 (Montana 2004). In this case the parties were unmarried tenants in common in the ownership of a piece of real estate. It was undisputed that the parties agreed to split their expenses by Petitioner paying for housing and

Respondent paying for living expenses. In addition, the parties split the proceeds from other parties roughly equally during their relationship and made other contributions to remodeling. In this case, the Supreme Court of Montana considered a claim of unjust enrichment in the context of a partition action. The Court ruled that the presumption of equal division in a partition action shifts where there is evidence of unequal contribution and "where the relationship between the parties indicates that one might have intended to make a gift to the other". The Court stated "to ignore the conduct of the co-tenants during their relationship, as such is relevant to establishing their intent as to how property held as tenants in common is to be divided when they part ways, would be to ignore the reality that how the parties conducted their relationship is relevant circumstantial evidence of such intent." Citing *In Re: State of Dern Family Trust*, 928 P.2d at 152 (1996, Mont) Thus, by dividing property which was titled together, as well as property, not titled together, the Court found that the parties showed an intent to split their assets equally and that there was no evidence that one party was expected to only pay rent.

Salzman v. Bachrach, 996 P.2d 1263 (2000 Colo). This case involved unmarried cohabitants who lived in a jointly titled home which was transferred to the sole name of Petitioner for financial reasons. At the time of separation there was no jointly titled real estate. This was a partition action where the Supreme Court of Colorado considered issues of unjust enrichment and restitution. The Court determined the parties were joint venturers in the construction and payment of the home finding that their joint efforts

allowed both to maintain a larger home, better lifestyle and the benefits of shared expenses. The case was remanded to the trial court to determine the worth of each party's contribution, reasonable rental value for periods of habitation and whether the unclean hands doctrine barred any portion of recovery.

Ulrich v. Zemke, 654 N.W. 2d 458 (2002 Wisc.). The Wisconsin Court of Appeals considered a seven year period of cohabitation where the parties financial relationship remained constant, co-mingling of finances, shared expenses, acquiring property through joint efforts and having two children. The Court found it immaterial that the female co-habitant did not directly participate in the acquisition and maintenance of each separate piece of property and supported the Circuit Court's application of unjust enrichment, with additional guidance.

Warren v. Gay, 2006 Conn. Super. LEXIS 1171 (April 13, 2006). This decision from the Superior Court of Connecticut supported a female cohabitant's claim for equitable relief based on alleged breach of contract by Respondent male cohabitant. The male moved to strike her complaint based on Connecticut not recognizing common law marriage or marital type rights arising from cohabitation. The Court granted the motion to strike claims for palimony, and denied the motion to strike claims for constructive and resulting trust, and accounting and unjust enrichment.

The foregoing cases show a clear and significant trend to award equity and real property interests to cohabitants where elements of reliance can be shown, absent formal

agreements. Similarly, the trial court herein should have recognized the equity claims of Mr. Richards.

III. THE TRIAL COURT COMMITTED LEGAL ERROR IN NOT APPLYING THE THEORY OF PROMISSORY ESTOPPEL AND NOT CONSIDERING THE THEORY OF IMPLIED CONTRACT AND CONSTRUCTIVE TRUST TO SUPPORT PETITIONER'S CLAIMS FOR HOME EQUITY AND A FAIR PROPERTY DIVISION.

Similar to unjust enrichment, the theory of promissory estoppel is an equitable remedy which applies to Respondent's situation. This is a remedy to be used where four elements can be established as follows:

1) A person acts in reliance on a promise made by another;

2) The promisor knew that the other party had relied on the promise which the promisor should reasonable expect to induce action or forbearance in a reasonable person;

3) The promisor was aware of all material facts;

4) A party relies on the promise and the reliance resulted in a loss to that party.

See *Youngblood v. Auto-Owners Ins. Co.* 158 P.3d 1088 (Utah 2007)

Marshalling the evidence:

Again, the trial court focused on what the Petitioner didn't do during the relationship rather than applying the test to the evidence of what he did do.

1. The Court denied recovery to Mr. Richards based on his claim for promissory estoppel because the Court concluded that Mr. Richards did not carry his

burden of proof to establish by a preponderance of evidence (1) that he acted with prudence and with reasonable reliance on a promise made by the Respondent; (2) the Respondent knew the Petitioner had relied on the promise which the Respondent should reasonably expect to induce action on the part of Petitioner; (3) the Respondent was aware of all material facts; and (4) that Petitioner relied on the promise and the reliance resulted in a loss to him. Conclusions of Law, Record at 246.

2. Ms. Brown testified that it was fair for her to retain all increased value in the house over ten years because Mr. Richards had not "participated in the running of the house and paying a sum to buy into the house to make it half his own so that even when they separated, it would be half his and they would have to either sell it or determine how they were going to pay each other off; and further that it would have been different if their relationship "didn't go by the wayside as it did." (Tr. 106-107).

The evidence is legally insufficient to support the trial court's Findings and Conclusions. Promissory estoppel is also applicable given the representation that Respondent made to Petitioner concerning future transfer of the real property to his name and joint title. The Utah Supreme Court has stated that the measure of damages in such actions is "the reasonable value of what Petitioner has done" *Fowler v. Taylor*, 554 P.2d 205(Utah 1976). In this case, the trial court found the Petitioner's testimony regarding promises made to him by the Respondent more credible than the Respondent's testimony regarding the same. Moreover, the Petitioner added directly to the value of the residence over a period of ten years by contributing approximately half of the mortgage payments due during that time, by paying significant sums towards improvements, repairs and assisted Respondent in obtaining tax benefits from the property. The Petitioner's contribution was thus equal to that of Respondent's during the ten year span and Petitioner requested that he be awarded one-half the appreciation of the property acquired

during the term of his occupancy, in the amount of $91,658.00. Alternatively, Petitioner sought return of his actual mortgage and improvements paid to Respondent.

This evidence also supports a finding that Petitioner had an implied contract with Respondent to pay him equity upon separation and other claims. *Davies v. Olson*, 746 P.2d 264 (Utah App. 1987) According to the Second Restatement of Contracts, a contract implied in fact is a "contract" established by conduct.

This evidence also supports a finding that Petitioner established a constructive trust as a matter of equity. Courts recognized a constructive trust where there has been (1) a wrongful act, (2) unjust enrichment, and (3) specific property that can be traced to the wrongful behavior. Such trust are usually imposed where injustice would result if a party were able to keep money or property that rightfully belonged to another. *Wilcox v. Anchor Waste Co.,* 164 P.3d 353, 362 (Utah 2007). Notably, in this case, and after the trial court granted summary judgment on the Petitioner's claim for relief under the common law marriage statute, per se, the required confidential relationship emerged between these parties. This doctrine rests upon the principle of inequality between the parties and implies a position of superiority occupied by one of the parties over another. *In the Matter of Estate of Jones,* 759 P.2d 345, 347 (Utah App. 1988)

CONCLUSION

The trial court erred as a matter of law to grant summary judgment, which barred presentation of the common law marriage issue at trial. This error was substantial and

prejudicial to the Petitioner and warrants reversal. The statute requires that the determination of a marriage under this statute must occur during the relationship or within one year following the "termination" of that relationship. Ignoring the statute's plain language, the trial court arbitrarily ruled that termination meant the date when parties ceased living together. The plain language of the statute is clear and unambiguous and requires a broader analysis to determine when the relationship terminates; and further no single factor is dispositive on that issue.

Although the court concluded as a matter of law that Petitioner was entitled to compensation under the theory of unjust enrichment, and because he had demonstrated a preponderance of evidence of such at trial, the trial court then arbitrarily misapplied the legal theory to deny recovery for anything other than what the court deemed to be a "home improvement" including home maintenance expenses, contributions to the mortgage over a period of 10 years, and maintenance of transportation during the relationship. If the court had correctly applied the unjust enrichment test as set forth in Utah law, the clear and uncontroverted evidence at trial demonstrated that Petitioner proved compensatory amounts in these other categories, which should have been awarded to him.

Relying upon its error in granting summary judgment and compounding the harm to Petitioner, the trial court also granted a pre-trial protective order, which improperly limited the Petitioner's discovery requests for information to establish not only common

law marriage issues, but also evidence relative to his alternate equitable theories. Ultimately, and in spite of the limitation on evidence, the trial court found that Petitioner and Respondent were in a "family" and "marriage like" relationship, but without the common law marriage remedies available to him, Petitioner had not succeeded in proving that his contributions to the mortgage and expenses of Respondent's household over a period of 10 years was sufficient to support his claims under promissory estoppel, unjust enrichment, constructive trust, or implied contract. This result was because the trial court improperly limited the discovery and presentation of evidence on these theories. This result is capricious and lacks confidence and is, therefore, reversible error. Therefore, this Court should reverse the trial court's decision and permit the Petitioner a fair trial; or in the alternative this result should be remanded and the trial court and direct entry of judgment for Petitioner for reimbursement of amounts paid towards the Respondent's mortgage, maintenance, transportation, and should award to Petitioner his attorney's fees incurred herein.

Respectfully submitted this 6th day of February, 2009.

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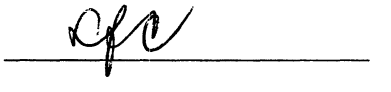
CERTIFICATE OF MAILING

I, the undersigned, hereby certify that I caused two (2) copies of the foregoing BRIEF OF APPELLANT to be mailed, postage prepaid, on this 6th day of February, 2009 to:

Tineke Van Dijk
P.O. Bo 0992
Midvale, UT 84047



ADDENDUM

1. Findings of Fact and Conclusions of Law and Order, July 9, 2008.

2. Memorandum Decision (as to Common Law Marriage claim), January 8, 2008.

3. UCA § 30-1-4.5, Utah Common Law Marriage statute.

4. Rule 56 (c) Utah Rules of Civil Procedure, Summary Judgment Rule.

5. Rule 26 Utah Rules of Civil Procedure, Protective Orders.

Addendum No. 1

Findings of Fact and Conclusions of Law,

Order,

Entered July 9, 2008

STEVE RICHARDS, Petitioner,	:	
vs.	:	FINDINGS OF FACT, CONCLUSIONS OF LAW, and ORDER
DIANA BROWN, Respondent.	:	Case no. 064906011
	:	Judge Denise Posse Lindberg

The Court conducted a bench trial in this case on June 16, 2008. Petitioner Steve Richards was present and represented by his counsel, Suzanne Marelius. Respondent Diana Brown was present and represented by her counsel, Tineke E. Van Dijk. The Court received the testimony of the parties and the trial exhibits submitted by stipulation. Having considered all the evidence the Court now enters its

FINDINGS OF FACT

1. These parties never married, but began living together in 1995, a daughter, Stephanie, was born March 29, 1996.

2. During their ten years together, the parties resided in a house that was owned by Respondent and which she had received as part of a divorce settlement from her former spouse. Respondent had purchased the property on 12th Avenue in Salt Lake City with her then-husband Erik Priest on or about December 1989. Respondent and Mr. Priest divorced in September 1991. On or about that time (and in connection with Respondent's divorce from Mr. Priest), the parties asked a mortgage company "figure out" their equity in the house. Respondent and Mr. Priest

relied upon the mortgage company's assessment of their equity as the basis for their property settlement; they did not have the home independently appraised. Based on the figures developed by the mortgage company, Respondent "paid-off" Mr. Priest's equity interest in the home.

3. The parties separated in August 2005 when Petitioner moved out. Petitioner rented a residence six blocks away from Respondent's home in order to be close enough to help care for Stephanie. Petitioner pays $750 per month for his present residence, which he shares with his now-fiancee.

4. Shortly after the parties separated in 2005 they went to mediation with Marcie Keck to address the custody issues; those issues were fully resolved in mediation. Petitioner testified credibly that he did not immediately file his Petition because he was expecting that the parties would engage in additional mediation with a view towards resolution or reconciliation.[1] As a result of this delay the Petition was not filed until December 21, 2006, more than a year after Petitioner had moved out of the residence.

5. Petitioner's "Verified Petition for paternity and related matters" stated three claims for relief:

(a) a declaration of his paternity over the parties' minor child, Stephanie and for joint legal and physical custody arrangement;

(b) declaration of a common law marriage; and

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[1]Petitioner testified (without contrary testimony from Respondent), that the parties had anticipated going back to mediation to resolve their property dispute. However, Petitioner testified that Respondent "backed out"of the second round of mediation

(c) equitable division of property in which parties resided based on partnership, implied contract for services, and/or constructive trust.

6. Respondent, Ms. Brown, agreed with paternity and joint legal/physical custody, but denied the common law marriage claim alleging it was untimely; she also argued that the Court lacked jurisdiction to determine a contract basis for apportionment of equity related to home unless it pertained to paternity or some form of divorce action.

7. By stipulation of the parties, Temporary Orders entered in this case established Petitioner as the legal parent of Stephanie, and awarded the parties joint legal/physical custody. The Temporary Orders adjudicated all child related issues between the parties, but reserved for trial Petitioner's claim for equitable division of property.

8. Thereafter, Respondent brought a motion for partial summary judgment asking the Court to declare that the parties did not have a common law marriage. The Commissioner agreed and recommended that summary judgment be granted and the claim dismissed. Petitioner objected; the Court affirmed the Commissioner's recommendation. At that point, only Petitioner's equitable division claim remained to be adjudicated. The Commissioner certified that issue for trial.

9. The parties are both trained as nurses, although Petitioner no longer works in that capacity.[2] The parties met when they while working as nurses at Primary Children's Medical Center. Respondent was married at time and testified they were friends. Eventually she divorced

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[2]Petitioner subsequently became employed as a clinical software consultant with Intermountain Health Care.

at or about the time Petitioner moved out of the area; when Petitioner moved back to Salt Lake City some years later, they moved in together. The parties had relatively comparable levels of earnings.

10. Although the parties shared living expenses, they never combined their bank accounts. Instead, Respondent kept detailed written twice-monthly tallies of expenditures incurred (e.g., food, utilities, insurance, house security, cable, Stephanie's expenses, birthday gifts, etc). See Ex. 11-A. The expenditure tallies also included household maintenance expenses (e.g., lawn maintenance, appliance repair, etc). The parties' practice was that twice a month Respondent would present these hand-written tallies to Petitioner and he would then pay Respondent. for one-half of those costs.[3] Petitioner testified, without challenge by Respondent, that whatever costs she identified in the twice-monthly tally sheets, he "paid without question."

11. Both parties testified that the tallies were not exhaustive–that is, there were some purchases or other expenditures that were not included in the twice monthly tallies–but the parties either shared those costs equally or would alternate paying those expenses so as to equalize between them the costs involved in maintaining their family lifestyle. For example, Petitioner's unchallenged testimony was that he contributed significant funds to major and minor

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[3]Because it is her practice to purge her records on a regular basis, Respondent no longer has record of all of the twice-monthly expense tally sheets that she maintained during the course of their 10 year relationship. That said, Respondent admits that she prepared the tally sheets twice monthly and that they would regularly meet to reconcile accounts. Respondent does not contest Petitioner's assertions as to the pattern and practice of their money management throughout the relationship. Respondent further agrees that the tally sheets produced as exhibits at trial were representative of, and consistent with, those presented to the Court at trial.

house improvements such as a new replacement deck for which Petitioner paid $8895.00,[4] $312.00 towards a lawn sprinkler system, and $179.00 for the purchase and installation of a new ceiling fan.

12. In addition to the above stated sharing of expenses, the undisputed evidence is that from the time he moved in, Petitioner also voluntarily gave Respondent money towards the monthly mortgage expense. When he first moved in, he paid $400 per month towards the mortgage. When Stephanie was born, Petitioner on his own increased his contribution to $550 per month. Later, when he got a raise, he again voluntarily increased the monthly payment to $650. On some occasions Petitioner would write his check directly to Countrywide, Respondent's mortgage company; other times he would simply write out the check directly to Respondent, at or about the time he also paid his one-half share of the other living expenses (per the tally sheets).

13. Although he acknowledged that his monthly "house" payments were less than half of the monthly mortgage obligation, Petitioner testified that he was making "other contributions" to equalize the family's expenses.[5] At trial, Respondent admitted that Petitioner's financial

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[4]Respondent testified that she had paid for one half of the deck costs, but could produce no evidence to support her claim. In contrast, Petitioner has documentary evidence of nearly $9,000 he paid for the deck, and his testimony that this represented payment in full for the deck. The Court gives no credence to Respondent's testimony on this issue. According to Respondent, she "didn't know" whether the new deck added any value to the house. While it is true that the evidence at trial was insufficient to establish the exact amount of value that the new deck added to the home, there is more than adequate evidence to establish Respondent's financial contribution to home *improvements* (as contrasted with home *maintenance*) in considering Petitioner's equitable claims.

[5]For example, Petitioner brought a car to the relationship, and his vehicle (which he maintained and insured without financial contribution by Respondent) was used for shopping, to

contribution to the home and family was equal to her own.

14. At trial Respondent argued that Petitioner's monthly payments towards the mortgage was nothing more than "rent" from a "tenant." Nevertheless, she admitted that at no time did she ask Petitioner for nor did she negotiate a specific housing payment with him. She admitted that she never presented Respondent with a rental agreement and she never declared the moneys she received from him in her taxes as "rental income." Respondent also admitted that at no time during their 10 years of co-habitation did she ever refer to Petitioner as her "tenant" or to the money she was receiving from him monthly as "rent." On the contrary, the undisputed evidence at trial was that throughout their time together Petitioner and Respondent viewed themselves as a "family" and presented themselves to their co-workers and associates as "husband" and "wife," even after their intimate relationship had terminated.[6] See, e.g., Ex. 7, Ex. 8.

15. At the time Petitioner moved in with Respondent, Respondent's monthly mortgage payment was $1187.00 per month. That amount increased to $1197.00 per month in January

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take family outings, and to transport Stephanie to various activities. Petitioner did all the driving because Respondent did not own a car nor had a drivers' license during their relationship. Petitioner acknowledged that Respondent's primary means of transportation did not involve his vehicle; rather, she used a bus pass, taxis, etc. Although Petitioner conceded that Respondent "almost exclusively used the bus to get to work" (while he drove to work), he nevertheless maintains he provided the "family transportation" and should now be credited for that financial contribution. The Court finds that while Petitioner provided a general benefit to the family when he used his car to transport Stephanie to an event, or the family on an outing, the substantial majority of expenses he incurred to maintain the vehicle were expenses that he would have incurred whether or not the parties had co-habited.

[6]For example, Respondent remained as a beneficiary in at least some of Petitioner's retirement accounts (along with their daughter, Stephanie).

1997; increased again in January 1998 to $1226.00, then adjusted down to $1180. In October 1998; again adjusted downward in November 1999 to $1173.00. Respondent refinanced the property in Jan. 2001, paying off the one mortgage balance of $118,871.71. Ex. 9-B. It appears that as part of the refinancing Respondent took $40,128.29 in equity out of the property, because the new mortgage was for $159,000, with monthly payments of $1468.88. In May 2002, the monthly mortgage payment increased to $1497.00; it increased again in March 2003 to $1516.13. That mortgage was paid-off in June 2004 in the amount of $148,045.67 when Respondent again refinanced her home. As with the prior refinancing, the new mortgage of approximately $172,900 exceeded the pay-off amount by approximately $25,000.[7] Ex. 9-A. Based on this evidence it appears that Respondent again took money out of the equity accrued in the home. There is no evidence that Petitioner shared in those equity withdrawals.

16. Petitioner testified that there were "several times" during their life together when he "felt insecure about [his] financial position and [his] position in the family".[8] According to Petitioner, Respondent had "recognized my insecurity" and had referenced how she had treated her ex-husband fairly and paid him when he moved out. According to Petitioner, Respondent told him that if they ever split, he [Petitioner] would be treated the same–that is, he would get an interest in his contribution to the home. Based on those representations Petitioner believed he and

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[7]Based on trial ex. 9-A, it appears that as of April 14, 2008, the outstanding balance on this latest mortgage (with Citicorp Trust Bank) is $148,909.66.

[8]The parties began discussing having Petitioner's name on the title of the house approximately 6 months after Stephanie was born.

Respondent had an agreement that in the event of a split he would get "at least partial equity" in the home, based on his contributions. He testified that he considered the twice monthly tally-sheet accountings to be the parties' record of his contributions and interest in the home. For her part, Respondent testified that the twice-monthly accounting sheets were "not to show [Petitioner's] payments towards equity in the home," but rather, to respond to Petitioner's request for clarification as to "where the money was going" monthly.

17. Respondent acknowledged at trial to having made statements over the years (a) that referenced how she had dealt with her ex-husband, (b) that she would treat Petitioner equitably, and (c) that she would be willing to put Petitioner on the title to the house, she testified that those statements were always subject to having Petitioner first pay her for one-half of her equity in the home. Petitioner disputed Respondent's testimony, saying he had "no recollection" of there being a pre-condition that he pay Respondent one half of the equity in the house before his name could go on the title.

18. Respondent acknowledged she was aware it was important to Petitioner to have his name on the title, and that he periodically raised this issue. Although Respondent pointed to the two re-financings of the house as evidence that Petitioner had opportunity to arrange "to pay her for her equity" had he chosen to do so, she also acknowledged that she never identified for Petitioner a specific amount of money that would satisfy her in order to get his name on the title. She also acknowledged that she never seriously pursued any efforts to put Petitioner on the title.[9]

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[9]The parties testified that on one occasion Respondent brought home some paperwork to refinance the house. However, Petitioner testified that "two days later" the papers were "gone"

19. Both parties testified that the issue of putting Petitioner's name on the house title became an increasing source of contention between them over time. Petitioner also testified that if he had known Respondent wouldn't follow through with her representations regarding his equity interest in the house, he "would have made different financial choices." For her part Respondent testified that if, at the beginning of the relationship, Petitioner had written a check towards the equity "I would have honored that commitment." However, as difficulties mounted in their relationship and their arguments increased, Respondent stated she felt "less inclined" to include Petitioner on the title to the house.

20. The Court finds the testimony of Petitioner to be more credible than that of Respondent on the issue of Respondent's representations to Petitioner that she would treat him equitably (on the issue of his interest in the home) if they ever separated. Petitioner had never been married, whereas Respondent had been through a divorce and a property division previously. Respondent therefore had a greater understanding of what a "split" between them would entail with respect to any distribution of property.

21. The Court does not find credible Respondent's testimony that she always conditioned her statements to Petitioner on his paying her for one-half of the equity in the home. Rather, the Court finds that as difficulties mounted between them, Respondent never clearly conveyed her position with respect to what interest in the home, if any, she was willing to convey to Petitioner, nor did she clearly specify what he had to do to secure that interest. Nevertheless, Petitioner

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and nothing was ever done. Nevertheless, Petitioner testified that the fact that she had brought the papers home reassured him that "she understood his concern."

knowingly accepted his financial contributions that permanently improved the home. As more fully explained below, the evidence clearly establishes that Petitioner paid for significant improvements to the home premised on his mistaken belief that he was accumulating an equity interest in the home.

22. For his part, Petitioner never took the initiative to ensure that steps were taken to clarify his position or secure his interest. Although the parties agree that the issue of Petitioner's name on the home's title was an important matter to him, during their time together Petitioner never took affirmative steps to have the home appraised. Therefore, there is no information available by which the Court can assess how his various contributions enhanced the value of the property. Similarly, he never initiated contacts with any banks or mortgage companies to explore what would be involved in arranging for a transfer of title to joint tenancy, co-tenancy, or some other means for securing his interest. The closest the parties ever came to any such efforts is referenced at note 9, *supra,* when Respondent brought home some papers for a possible refinancing that was intended to include Petitioner as an equity interest holder. During the entire time that Petitioner and Respondent co-habited, Respondent refinanced the home twice but Petitioner apparently chose not take those opportunities to resolve his concerns one way or another.

23. The parties began experiencing difficulties in 2001, which were exacerbated by their dispute over the house.[10] They began sleeping in different parts of the house. While there was

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[10]Respondent testified that Petitioner "stopped doing anything in the house" and stopped participating in making joint decisions for the care of Stephanie Although Respondent

disputed testimony regarding the reasons for the separate sleeping arrangements, it is clear that the parties' intimate relationship terminated sometime around that time. In any event, it terminated substantially earlier than when Petitioner actually moved out in Aug. 2005.

24. Respondent testified that between the time of her divorce in 1991, and the time Petitioner moved in (in 1995), she had a tenant for six months. The tenant was a friend; Respondent did not enter into a formal tenancy agreement with the tenant, but he paid her $300 per month to rent her basement.

25. As part of these proceedings the home at issue was appraised. The appraisal was completed on March 17, 2008 and concluded that the *present* market value of the home is $425,000. Neither party has contested the home's current value.

26. Although the Court has before it evidence of the present value for the home, no evidence was presented as to the actual value of the home on or about August,1995, when Petitioner moved in, or of its value in August 2005, when Petitioner moved out. Indeed, there is no evidence before the Court as to what the house's value was in 1991 when Respondent and her

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acknowledged that Petitioner "agreed with all her decisions regarding Stephanie and attended her activities, Respondent claims "he did not show interest in participating in the decision-making." Petitioner strongly disputes Respondent's claims in this regard. He acknowledges that even after there no longer was a romantic relationship between the two of them, they maintained a "cordial relationship in which they each participated" in Stephanie's life and activities. After hearing the testimony, observing the parties' demeanor, and making assessments of credibility, the Court does not find Respondent's contentions to be credible, at least not with respect to Stephanie. While the Court cannot determine the extent to which Petitioner did (or did not) contribute to the maintenance of the home after the parties began experiencing difficulties, throughout the course of this case it has been evident that Petitioner is (and has been) very interested in participating fully in his daughter's life.

first husband were divorced. Although they could have done so as part of the appraisal completed in March 2008, apparently neither party requested that the appraiser conduct retrospective appraisals of the property for any of those relevant times.

27. Petitioner has presented the Court with detailed exhibits, not contested by Respondent, that over the years Petitioner paid her $71,100.00 in monthly payments towards the mortgage, see Ex.5; $960.03 towards "home maintenance," and $1,024.50 towards "lawn service." Ex.6-A. Petitioner also presented evidence (through photocopies of tissue copies of checks he'd written) of paying another $12,470 in other house expenses. The largest share of those is attributable to the nearly $9,000 in deck-related payments. Ex. 6-B. Although Respondent does not challenge this evidence of payments by Petitioner, in most cases the Court cannot discern from the exhibit whether those expenses were incurred for household improvements, or simply involved other expenses that are not related to an improvement to the house (e.g, check #438 for $30 with a "memo" note of "bed delivery"). In most cases there is no "memo" notation that explains the purpose for the expenditure; in many cases, the handwriting and/or amounts shown are difficult to discern clearly.[11]

28. Of the various checks included in exhibit 6-B, there was direct trial testimony only with respect to two checks–#s 253 and 257–which Petitioner expressly identified as being the checks

[11]The exhibit consists of photocopies of "tissue paper" checks which the drafter keeps for record-keeping purposes.

he wrote to pay for the deck.[12] Although there was no testimony offered as to checks #106 and #111, the exhibit copy of #111 shows "swamp cooler" written in the "memo" section of the check; the check is written in the amount of $250. While this check does not expressly state that this expenditure was a purchase, the check carries a date of Sept 14, 2002. Exhibit 6-A then shows that beginning 2003 there are more modest entries for "home maintenance" of a swamp cooler. There are no entries related to a "swamp cooler" dating earlier than September 2002. Check #106 includes a notation in the "memo" section that appears to read "Art Thoen." That check was written on Sept. 2, 2002 to Ace Conditioning & Heating, LLC, the same entity to which check #111 was written. Based on this evidence and the reasonable inferences that can be drawn from it, the Court believes it is more probable than not that the two checks–totaling $750–were for a home improvement expenditure (i.e., the purchase and installation of a swamp cooler), rather than simply a maintenance expense. The Court notes that both of these household improvement expenditures, as well as others (e.g., the purchase and installation of a ceiling fan), were incurred after the parties' began experiencing difficulties in their relationship and had ceased their romantic involvement with each other.

29. The Court cannot, however, draw a similar conclusion from the remaining checks shown in exhibit 6-B. Two of those checks (#284 and 376) were written to a "Bill Maynard" and total$725.00. However, there was no testimony establishing who "Bill Maynard" is nor what

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[12]Although the copy of check #253 has VOID written across it, Petitioner testified that was an overwrite of another check (252) which he had voided. According to Petitioner, check #253 itself was not voided but was, in fact, negotiated. Respondent presented no contrary evidence on this issue so the Court accepts Petitioner's testimony on this matter.

those expenditures were for. Similarly, check #444 is written to "Ron Slough" in the amount of $84. There is no notation as to the purpose of that expenditure. Given that there is at least one check included in this exhibit (check #438) does not appear to be for a home improvement, the Court cannot conclude by a preponderance of the evidence that those unlabeled and unexplained checks are directly related to home improvements.

Based on the above Findings of Fact, the Court now enters the following

CONCLUSIONS OF LAW

30. Utah law is clear that a trial court faced with a claim for equitable division of property must first determine "what property is premarital and what property is marital." *Walters v. Walters,* 812 P.2d 64 (Utah Ct. App. 1991). The home purchased by Respondent with her first husband, and which she acquired after purchasing her first husband's equity interest at the time of the divorce, is clearly "premarital" property. As a general rule, "premarital property is viewed as separate property, and equity usually requires that 'each party retain the separate property he or she brought into the marriage.'" *Id., quoting Haumont v Haumont,* 793 P.2d 421, 424 (Utah Ct. App. 1990). The rule "is not invariable" and the court must "consider all of the pertinent circumstances." *Walters*, 812 P.2d 64. Here, the posture of this case clearly affects the analysis the Court must follow.

31. As referenced earlier, these parties never married, so there is no clear "marital" estate to divide. When the parties resolved their custody issues through mediation and the Court determined that Petitioner's common law marriage claim failed, this case lost its character as a "domestic" case Nevertheless, because Petitioner had also included a third, "civil," claim

raising various equitable theories, the case continued to trial.[13] Although the Petition alluded to various theories, in her closing argument Petitioner's counsel abandoned all theories except two: unjust enrichment and promissory estoppel.

32. For various reasons more fully discussed below, the Court cannot conclude that Petitioner is entitled to any share of equity in the home. However, the Court concludes that he has stated a claim for unjust enrichment.

33. To state a claim for unjust enrichment under Utah law, Petitioner bears the burden of establishing (a) that he conferred a benefit on Respondent, (b) that Respondent appreciated or had knowledge of the benefit received, and (c) that, under the circumstances, allowing Respondent to accept or retain that benefit without paying for its value would be inequitable. At a minimum, the evidence establishes that Petitioner paid $8895 towards a new deck for the home. Although there is no evidence regarding what value the deck added towards the overall

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[13]Respondent argued repeatedly that with the resolution of the paternity issue and dismissal of the common law marriage claim, there was no legal "hook" on which to base Petitioner's equitable claim to an interest in Respondent's premarital property. Respondent's argument appears to be premised on her assumption that Petitioner's equitable claim is based on this being solely a "domestic" case. But, the Petition clearly raises three separate causes of action–two of which are "domestic" in character, and one of which is "civil" in character, raising claims of unjust enrichment and/or promissory estoppel, among others. Under the rules of civil procedure, "[t]he plaintiff in his complaint . . . may join either as independent or as alternate claims as many claims either legal or equitable or both as he may have against an opposing parties." Utah R. Civ. P. 18(a). Alternatively, Petitioner certainly could have filed a separate civil action alleging unjust enrichment and promissory estoppel, and then moved to consolidate the action. *See* Utah R. Civ. P. 42(a). Thus, while the Court agrees that Petitioner may not have a right to an equitable interest in her premarital property, Petitioner has an adequate legal basis for pursuing his equitable civil claims for unjust enrichment and promissory estoppel. To the extent he prevails in those claims, he can certainly pursue his judgment against any assets held by Respondent.

value of the home, there is no doubt that the $8895 was a benefit conferred upon Respondent, and one of which she had knowledge and appreciated as a benefit. Based on the above-stated Findings of Fact, the Court concludes it would be inequitable to allow Respondent to retain the nearly $9,000 benefit Petitioner conferred on her by paying for a new deck without reimbursing him for that cost he incurred.

34. A similar analysis applies to other home improvements paid for by Petitioner, specifically, the $750 he expended for the purchase and installation of a swamp cooler and related costs, $312.00 towards a lawn sprinkler system, and $179.00 for the purchase and installation of a ceiling fan. The Court concludes that, in total, Petitioner benefitted Respondent's residence in the amount not less than $10,136.00. Therefore, Respondent should be held responsible for reimbursing Petitioner in full for that benefit.

35. Although there is some evidence Petitioner actually contributed greater amounts than that towards improvements that could reasonably be expected to increase the value of the home, the Court cannot conclude that Petitioner met his burden of proof as to those greater amounts. Specifically, the Court has determined that of the $960.03 referenced in Ex. 5 as "Steve's contribution" to "home maintenance," $491.25 was properly an *improvement* to the home rather than just *maintenance*, but $468.78 cannot be so considered and is therefore disallowed. The Court also disallows Petitioner's contribution of $1,024.50 towards a "lawn service" as referenced in Ex. 5. The Court classifies this as a home maintenance expense. While home maintenance expenses tend to contribute to maintaining the overall value of the home, they do not generally enhance that value. Therefore, the Court concludes that it is unable to estimate how

those expenses conferred a specific benefit upon Respondent which in fairness she should be required to repay.

36. A closer issue is whether, under an unjust enrichment theory, Petitioner should be entitled to claim reimbursement (or a share in the equity of the home) for some or all of the documented $71,100.00 which he paid Respondent towards the mortgage during their 10 year co-habitation. The Court concludes that Petitioner may not recover any part of those payments.

37. Petitioner is not entitled to *full* credit for those payments because, if he had not been living with Respondent, Petitioner would have incurred a housing expense elsewhere–whether as rent or as a mortgage payment. Thus, he would have had to make at least comparable–if not greater–payments elsewhere. If those payments had gone for rent, no equity would have accrued to Petitioner. Although there is limited evidence before the Court regarding how his payments compare to fair rental value for the home, the best evidence of how Petitioner valued the cost of his housing is shown by the amounts he actually paid Respondent towards the mortgage. Prior to Petitioner moving in, Respondent had rented a portion of her home for $300 per month. When Petitioner moved in a few years later, he began paying Respondent $400 per month. Thereafter, he periodically increased those payments–first to $550, and then to $650 per month. After moving out of the home, Petitioner rented an apartment for which he currently pays $750 per month. Thus, it appears that the amounts Petitioner contributed monthly are in line with what his rental costs would have been if he had rented a house or apartment somewhere close-by to where his daughter was living.

38. Petitioner claims that if he had understood he was not accruing equity he would have

organized his finances in some other fashion, and perhaps purchased a separate residence. Petitioner's statements of intent notwithstanding, the Court cannot give great credence to those claims. The fact is that Petitioner provided no evidence at trial that during the time the parties were co-habiting he had the financial wherewithal either to pay a down payment on a separate residence or to secure a mortgage solely in his name. Moreover, Petitioner's failure to take *any* steps to address an issue which he has testified was of such importance to him (*i.e.*, the opportunity to accrue equity in a home), suggests that Petitioner was not in a position to make his desires a reality by qualifying for a separate mortgage.[14] Thus, the Court cannot conclude that Petitioner was in a financial position where he would have been able to accrue equity at a separate residence had he not been misled by Respondent. Even if he had presented adequate evidence to prove he could have purchased a residence, the Court concludes that Petitioner has failed to prove that he would have accrued $71,100.00 worth of equity in a residence. Because there is no evidence of attempts by Petitioner to negotiate a mortgage, it is totally speculative what type of mortgage he would have qualified for, and what portion of his monthly payments would have gone towards equity-accruing principal versus debt service on the mortgage. Therefore the Court cannot begin to assess what portion of those payments could have created a *partial* equity interest for Petitioner had they been re-directed to purchasing a separate residence.

39. In sum, Petitioner has failed to carry his burden of showing, by a preponderance of the evidence, that any portion of the $71,100 in payments he made to Respondent unjustly enriched

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[14]Support for this conclusion is found in the fact that Petitioner is still renting, instead of purchasing, a residence.

her to his detriment, and that in fairness and equity he should be reimbursed for those payments.

40. The Court also concludes that the remaining expenses for which Petitioner claims credit–specifically, the majority of home maintenance and lawn service expenses–fall in the category of normal living expenses. These expenses yielded no measurable long-term enhancement to Respondent's equity in the home. Thus, the Court cannot find that Respondent was unjustly enriched by those expenditures incurred by Petitioner.

41. Petitioner's other theory for recovery is promissory estoppel. To state a claim for promissory estoppel Petitioner must allege four elements: (1) that he acted with prudence and in reasonable reliance on a promise made by the defendant, (2) the defendant knew that the plaintiff had relied on the promise which the defendant should reasonably expect to induce action on the part of Petitioner; (3) the Respondent was aware of all material facts; and (4) that Petitioner relied on the promise and the reliance resulted in a loss to him. The Court is not persuaded that Petitioner has carried his burden of proof to establish these elements by a preponderance of the evidence. But, even if the Court were to assume, for the sake of argument, that Respondent in fact promised Petitioner that she would put his name on the title to the home without any preconditions, and that she was aware of all material facts at the time she made that promise, the Court still concludes that Petitioner failed to carry his burden of establishing the other two prongs of promissory estoppel. Specifically, Petitioner has not shown he acted with prudence and in reasonable reliance of the alleged promise, nor has he shown that his reliance resulted in a loss to him.

42. As reflected in the Court's Findings of Fact, there is no evidence that Petitioner's actions

were "prudent." The Court believes that reasonably prudent person concerned with establishing an equity interest in a property into which he was investing funds would not have merely relied upon another to take the necessary steps to perfect that interest. Here, however, Petitioner took no such action to clarify what interest, if any, he was acquiring, nor to ensure that legal steps were taken to establish that interest. Similarly, the Court cannot conclude that Petitioner's various payments towards the mortgage or living expenses resulted in a loss to him. As noted earlier, he would have incurred living expense regardless of where he lived, and the available evidence is that the payments he made were not in excess of what fair rental value would have been. Thus, he incurred no cognizable losses.

43. On July 8, 2008 the Court conducted a telephonic conference with both counsel at which time the Court gave counsel an oral summary of its Findings and Conclusions. The Court also told counsel that it was finalizing a written decision stating with greater specificity the Court's analysis and determination. At that telephonic conference counsel for Petitioner asked the Court if it had considered Petitioner's contributions regarding the vehicle and if it had considered the issue of attorney's fees. The Court indicated that it had considered Petitioner's claims regarding the vehicle and was not persuaded by them. The Court believes it has adequately addressed the issue of the vehicle in these Findings of Fact, specifically, the findings reflected at note 5, *supra*. The Court hereby states its intent that note 5 (as well as other footnotes to the Court's decision) be considered fully a part of the Court's Findings of Fact. Based on those findings the Court concludes that Petitioner has failed to prove by a preponderance of the evidence that he conferred on Respondent a measurable and particularized benefit through the occasional use of the vehicle

for family outings. Although the evidence at trial was limited at best, Petitioner conceded that Respondent did not drive, did not have a drivers' license, and that taxis or mass transit formed her primary means of transportation to and from work. While the family went on outings together, the Court surmises that most of the transportation which Petitioner provided to Respondent as part of a family activity also included Stephanie. Petitioner would have provided transportation for himself and Stephanie in any event, so also transporting Respondent was, at most, an incidental benefit to her. Petitioner provided no evidence of times (if any) when he provided transportation to Respondent which he would not otherwise have incurred. In short, the Court has no evidence before it that would allow computation of some percentage of car usage that directly benefitted Respondent. Without that basic information the Court cannot find that Respondent was "unjustly enriched" at Petitioner's expense. Therefore the Court declines to credit Petitioner for the costs he incurred in maintaining and operating his vehicle during the parties' time together.

44. The Court does not recall the issue of attorney's fees being addressed at trial, but in any event the Court concludes that Petitioner has no basis for asserting such a claim. As indicated earlier, once the custody orders were entered in this case by stipulation and the Court granted summary judgment on the common law marriage claim, the character of the case as a domestic matter ended and the matter was tried as a civil claim for unjust enrichment and/or promissory estoppel. Therefore, there was no claim for an equitable award of attorney's fees before the Court. Moreover, even if the paternity adjudication had provided grounds for an attorney's fee award, that adjudication was made early in the case by stipulation of the parties. Therefore, any

consideration of such fees would not have extended to include fees incurred in subsequent litigation. Additionally, at trial Petitioner presented no evidence that would have supported an attorney's fee award. To warrant an equitable award of attorney's fees in a domestic matter, the party seeking such an award bears the burden of showing a financial need for such an award, and the other party ability to afford the requested award. There was no testimony presented at trial on any of those issues. The only evidence arguably relevant to this determination would have been evidence that the parties had comparable levels of training and income. That is insufficient, as a matter of law, to establish any entitlement to an attorney's fee award.

45. Moreover, because the issue at trial involved a civil claim, rather than one brought under divorce or paternity statutes, the American rule applies. Thus, each side is normally expected to bear its own attorney's fees unless there is a contractual or statutory basis for an attorney's fee award. In this case Petitioner abandoned any contract claim he may have had against Petitioner, choosing instead to rest on equitable claims of unjust enrichment and promissory estoppel. Petitioner has identified no other statutory basis for an award of attorney's fees. Therefore, the Court concludes that Petitioner is not entitled to attorney's fees.

46. As a final matter, pursuant to the parties' earlier stipulation the terms of the Temporary Order and Parenting Plan would become part of the permanent Paternity Order. (see Ex. 1 &3). Because Respondent's counsel will shortly be relocating out of state, Petitioner's counsel has agreed to assume responsibility for preparing an Order and Determination of Paternity incorporating the stipulated terms.

ORDER

47. Petitioner's counsel to prepare and submit for the Court's signature a final Order and Determination of Paternity pursuant to the parties' stipulation.

48. With respect to all other issues addressed in this decision incorporating Findings of Fact Conclusions of Law, and Order, this shall be the final Order of the Court and no other form of order will need to be submitted by counsel.

Entered by the Court this 9th day of July, 2009.

Denise Posse Lindberg, Third District Court Judge

CERTIFICATE OF NOTIFICATION

I certify that a copy of the attached document was sent to the following people for case 064906011 by the method and on the date specified.

METHOD	NAME
Mail	SUZANNE MARELIUS Attorney PET 261 E 300 S SUITE 300 SALT LAKE CITY, UT 84111-2714
Mail	TINEKE E VAN DIJK Attorney RES 7602 S 425 EAST MIDVALE UT 84047

Dated this 10 day of July, 2008.

B H Weingert

Deputy Court Clerk

Addendum No. 2

Memorandum Decision,

Entered January 8, 2008

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

STEVE RICHARDS,	:	MEMORANDUM DECISION
Petitioner,	:	CASE NO. 064906011
vs.	:	
DIANA BROWN,	:	
Respondent.	:	

Petitioner's Objection to Commissioner's Recommendation re: grant of Partial Summary Judgment on common law marriage claim is overruled.

The Court has carefully reviewed the parties' briefing on respondent's Motion for Partial Summary Judgment, petitioner's Objection to the Commissioner's Recommendation, and respondent's Response. The Court has also reviewed the case law defining cohabitation in various contexts.

In Haddow v. Haddow, 707 P.2d 669 (Utah 1985), the Utah Supreme Court defined the term "cohabitation" to include two key elements: common residency and sexual contact evidencing a conjugal association. The Haddow case arose in the context of an ex-husband's request to terminate alimony payments after his former spouse had allegedly "cohabited" with another man. The appellate court determined that although this new boyfriend spent substantial amounts of time in the woman's home, it was not his principal residence. Therefore, the Court held that "the common

residency element of cohabitation ha[d] not been established." Id. at 674.

Although Haddow arose in the alimony termination context, the Supreme Court applied the Haddow elements in evaluating whether a polygamist was cohabiting with one or more women. *See*, State v. Green, 2004 UT 76, 99 P.3d 820. In that case the trial court had determined that Mr. Green had entered into a common-law marriage under Utah Code Ann., § 30-1-4.5, with one of the women with whom he cohabited. While State v. Green, is not squarely on point with this case, the Supreme Court's discussion of Haddow in that context persuades the Court that the residency prong is an essential element in evaluating the point at which the asserted common law relationship terminated.

In this case, it is undisputed that the sexual contact between the parties terminated in 2001, and that the parties physically separated in September 2005 when petitioner moved out of the residence. Petitioner did not assert his common law marriage claim until December 2005 when he filed his Petition to establish paternity and related matters. Under In re Marriage of Gonzalez, 2000 UT 28, 1 P.3d 1074, a plurality of the Utah Supreme Court concluded that Utah Code Ann., § 30-1-4.5 required the filing of a petition for adjudication of marriage within one year after the termination of the relationship. Because the latest possible date under which the parties could have been said to have cohabited ended in

September 2005 when petitioner moved out, that marked the point from which the Petition needed to have been brought.

The Court agrees with the Commissioner that, as a matter of law, the Petition was untimely in that it was brought after the one year period from the termination of the common law marriage relationship. Therefore, the Commissioner's Recommendation is affirmed; Objection is overruled.

Dated this 8 day of January, 2008.

/S/

DENISE P. LINDBERG
DISTRICT COURT JUDGE

MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the foregoing Memorandum Decision, to the following, this 9 day of January, 2008:

Suzanne Marelius
Attorney for Petitioner
261 East 300 South, Suite 300
Salt Lake City, Utah 84111

Tineke van Dijk
Attorney for Respondent
P.O. Box 0992
Midvale, Utah 84047

MB

Addendum No. 3

UCA § 30-1-4.5

Utah Common Law Marriage Statute

1 of 1 DOCUMENT

UTAH CODE ANNOTATED

*** Current through the 2008 Second Special Session and the 2008 General Election ***
*** Annotation current through 2008 UT 75 (10/31/2008); 2008 UT App 418 11/14/2008) and November 1, 2008 (FEDERAL CASES) ***

TITLE 30. HUSBAND AND WIFE
CHAPTER 1. MARRIAGE

Go to the Utah Code Archive Directory

Utah Code Ann. § 30-1-4.5 (2008)

§ 30-1-4.5. Validity of marriage not solemnized

(1) A marriage which is not solemnized according to this chapter shall be legal and valid if a court or administrative order establishes that it arises out of a contract between a man and a woman who:

(a) are of legal age and capable of giving consent;

(b) are legally capable of entering a solemnized marriage under the provisions of this chapter;

(c) have cohabited;

(d) mutually assume marital rights, duties, and obligations; and

(e) who hold themselves out as and have acquired a uniform and general reputation as husband and wife.

(2) The determination or establishment of a marriage under this section must occur during the relationship described in Subsection (1), or within one year following the termination of that relationship. Evidence of a marriage recognizable under this section may be manifested in any form, and may be proved under the same general rules of evidence as facts in other cases.

HISTORY: C. 1953, 30-1-4.5, enacted by L. 1987, ch. 246, § 2; 2004, ch. 261, § 2.

NOTES:
AMENDMENT NOTES. --The 2004 amendment, effective March 23, 2004, in Subsection (1), substituted "a man and a woman" for "two consenting parties" in the introductory clause and added "of legal age and" in Subsection (1)(a).

SEVERABILITY CLAUSES. --Laws 1987, ch. 246, § 5 provided that if any provision of Chapter 246, or the application of any provision to any person or circumstance, is held invalid, the remainder of the chapter is to be given effect without the invalid provision or application.

CROSS-REFERENCES. --Marriage, *Utah Const., Art. I, Sec. 29.*

NOTES TO DECISIONS

ANALYSIS
Compliance.

Effect.
Evidence.
Legal capacity of parties.
Limitation period.
Standard of proof.
Time for determination.
Cited.

COMPLIANCE.

The fact that the couple's closest friends did not consider them to be married, in conjunction with the fact that they were not consistent in holding themselves out as married, negated the establishment of a marriage under this section. *Hansen v. Hansen, 958 P.2d 931 (Utah Ct. App. 1998).*

EFFECT.

This section has only prospective, and not retroactive, effect. *Layton v. Layton, 777 P.2d 504 (Utah Ct. App. 1989).*

This section may not be applied retroactively. *Walters v. Walters, 812 P.2d 64 (Utah Ct. App. 1991),* cert. denied, *836 P.2d 1383 (Utah 1991).*

This section establishes "common law marriage" as a lawful form of marriage; thus, if the elements of Subsections (1)(a) through (e) are established, then a lawful marriage may be found to have existed prior to the entry of an order by a court or administrative body. *Whyte v. Blair, 885 P.2d 791 (Utah 1994).*

EVIDENCE.

Evidence of parties' intention to continue their marriage despite having obtained a divorce was sufficient to support the court's determination that the parties did in fact enter a common law marriage that commenced the same day as entry of the divorce decree in their first marriage. *Kelley v. Kelley, 2000 UT App 236, 9 P.3d 171.*

LEGAL CAPACITY OF PARTIES.

A party who has entered into a valid, licensed marriage is not legally capable of entering an unsolemnized marriage under this section. *Kunz v. Kunz (In re Kunz), 2006 UT App 151, 136 P.3d 1278.*

LIMITATION PERIOD.

The one-year limitation period in this section is a statute of repose rather than a statute of limitations. *Kunz v. Kunz (In re Kunz), 2006 UT App 151, 136 P.3d 1278.*

STANDARD OF PROOF.

The standard of proof applicable to the establishment of facts under this section is a preponderance of evidence standard. *Hansen v. Hansen, 958 P.2d 931 (Utah Ct. App. 1998).*

The proper standard of proof for adjudication of marriage under this section is preponderance of the evidence. *In re Gonzalez, 2000 UT 28, 1 P.3d 1074.*

TIME FOR DETERMINATION.

The time limitation in Subsection (2) is met if a petition for adjudication is filed within one year after the termination of the relationship. *In re Gonzalez, 2000 UT 28, 1 P.3d 1074; Greaves v. Baker, 2001 UT 45, 28 P.3d 668.*

The time restriction of this section on establishing the existence of a common law marriage applies both to actions to establish the marriage and actions seeking simultaneously to establish the marriage and obtain a divorce. *Kelley v. Kelley, 2000 UT App 236, 9 P.3d 171.*

CITED in *State v. Johnson, 856 P.2d 1064 (Utah 1993).*

COLLATERAL REFERENCES

UTAH LAW REVIEW. --Recent Developments in Utah Law -- Legislative Enactments -- Family Law, *1988 Utah L. Rev. 273.*

Recent Developments in Utah Law, *2000 Utah L. Rev. 841 (2000).*

Turning a Blind Eye to Unmarried Cohabitants: A Look at How Utah Laws Affect Traditional Protections, *2007 Utah L. Rev. 215.*

Addendum No. 4

Rule 56 (c)

Utah Rules of Civil Procedure

Summary Judgment Rule

1 of 1 DOCUMENT

UTAH COURT RULES ANNOTATED

*** THIS DOCUMENT REFLECTS CHANGES RECEIVED THROUGH SEPTEMBER 1, 2008 ***

STATE RULES
UTAH RULES OF CIVIL PROCEDURE
PART VII. JUDGMENT

URCP Rule 56 (2008)

Review Court Orders which may amend this Rule.

Rule 56. Summary judgment.

(a) For claimant. A party seeking to recover upon a claim, counterclaim or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move for summary judgment upon all or any part thereof.

(b) For defending party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought, may, at any time, move for summary judgment as to all or any part thereof.

(c) Motion and proceedings thereon. The motion, memoranda and affidavits shall be in accordance with Rule 7. The judgment sought shall be rendered if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(d) Case not fully adjudicated on motion. If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) Form of affidavits; further testimony; defense required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the pleadings, but the response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. Summary judgment, if appropriate, shall be entered against a party failing to file such a response.

(f) When affidavits are unavailable. Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse

the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just

(g) Affidavits made in bad faith If any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party presenting them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt

HISTORY: Amended effective November 1, 1997, November 1, 2004

NOTES:

Amendment Notes -- The 2004 amendment substituted "move for summary judgment" for "move with or without supporting affidavits for a summary judgment in his favor" in Subdivisions (a) and (b), in Subdivision (c), deleted "filed and served" before "in accordance with" and substituted "Rule 7" for "CJA 4-501", substituted "If" for "Should it appear to the satisfaction of the court at any time that" at the beginning of the first sentence in Subdivision (g), and made stylistic changes throughout

Compiler's Notes -- This rule is similar to *Rule 56, F R C P*

Cross-References -- Contempt generally, §§ 78-7-18, 78-32-1 et seq

NOTES TO DECISIONS

Affidavit
-- Bad faith
-- Contents
-- Corporation
-- Experts
-- Extension of time to submit
-- Failure to submit
-- Inconsistency with deposition
-- Necessity of opposing affidavits
-- -- Resting on pleadings
-- Objection
-- Sufficiency
-- -- Hearsay and opinion testimony
-- Superseding pleadings
-- Unpleaded defenses
-- Verified pleading
-- Waiver of right to contest
-- When unavailable
-- -- Exclusive control of facts
-- Who may make
Affirmative defense
Answers to interrogatories
Appeal
-- Adversely affected party
-- Standard of review
Applicability
Attorney's fees
Availability of motion
Compliance with rule
Continuance for further discovery
Cross-motions
Damages
Discovery

Addendum No. 5

Rule 26

Utah Rules of Civil Procedure,

Protective Orders

1 of 1 DOCUMENT

UTAH COURT RULES ANNOTATED

*** THIS DOCUMENT REFLECTS CHANGES RECEIVED THROUGH SEPTEMBER 1, 2008 ***

STATE RULES
UTAH RULES OF CIVIL PROCEDURE
PART V. DEPOSITIONS AND DISCOVERY

URCP Rule 26 (2008)

Review Court Orders which may amend this Rule.

Rule 26. General provisions governing discovery.

(a) Required disclosures; Discovery methods.

(1) Initial disclosures. Except in cases exempt under Subdivision (a)(2) and except as otherwise stipulated or directed by order, a party shall, without awaiting a discovery request, provide to other parties:

(A) the name and, if known, the address and telephone number of each individual likely to have discoverable information supporting its claims or defenses, unless solely for impeachment, identifying the subjects of the information;

(B) a copy of, or a description by category and location of, all discoverable documents, data compilations, electronically stored information, and tangible things in the possession, custody, or control of the party supporting its claims or defenses, unless solely for impeachment;

(C) a computation of any category of damages claimed by the disclosing party, making available for inspection and copying as under Rule 34 all discoverable documents or other evidentiary material on which such computation is based, including materials bearing on the nature and extent of injuries suffered; and .

(D) for inspection and copying as under Rule 34 any insurance agreement under which any person carrying on an insurance business may be liable to satisfy part or all of a judgment which may be entered in the case or to indemnify or reimburse for payments made to satisfy the judgment. Unless otherwise stipulated by the parties or ordered by the court, the disclosures required by Subdivision (a)(1) shall be made within 14 days after the meeting of the parties under Subdivision (f). Unless otherwise stipulated by the parties or ordered by the court, a party joined after the meeting of the parties shall make these disclosures within 30 days after being served. A party shall make initial disclosures based on the information then reasonably available and is not excused from making disclosures because the party has not fully completed the investigation of the case or because the party challenges the sufficiency of another party's disclosures or because another party has not made disclosures.

(2) Exemptions.

(A) The requirements of Subdivision (a)(1) and Subdivision (f) do not apply to actions:

(i) based on contract in which the amount demanded in the pleadings is $ 20,000 or less;

(ii) for judicial review of adjudicative proceedings or rule making proceedings of an administrative agency;

(iii) governed by Rule 65B or Rule 65C;

(iv) to enforce an arbitration award;

(v) for water rights general adjudication under Title 73, Chapter 4; and .

(vi) in which any party not admitted to practice law in Utah is not represented by counsel.

(B) In an exempt action, the matters subject to disclosure under subpart (a)(1) are subject to discovery under subpart (b).

(3) Disclosure of expert testimony.

(A) A party shall disclose to other parties the identity of any person who may be used at trial to present evidence under Rules 702, 703, or 705 of the Utah Rules of Evidence.

(B) Unless otherwise stipulated by the parties or ordered by the court, this disclosure shall, with respect to a witness who is retained or specially employed to provide expert testimony in the case or whose duties as an employee of the party regularly involve giving expert testimony, be accompanied by a written report prepared and signed by the witness or party. The report shall contain the subject matter on which the expert is expected to testify; the substance of the facts and opinions to which the expert is expected to testify; a summary of the grounds for each opinion; the qualifications of the witness, including a list of all publications authored by the witness within the preceding ten years; the compensation to be paid for the study and testimony; and a listing of any other cases in which the witness has testified as an expert at trial or by deposition within the preceding four years.

(C) Unless otherwise stipulated by the parties or ordered by the court, the disclosures required by Subdivision (a)(3) shall be made within 30 days after the expiration of fact discovery as provided by Subdivision (d) or, if the evidence is intended solely to contradict or rebut evidence on the same subject matter identified by another party under paragraph (3)(B), within 60 days after the disclosure made by the other party.

(4) Pretrial disclosures. A party shall provide to other parties the following information regarding the evidence that it may present at trial other than solely for impeachment:

(A) the name and, if not previously provided, the address and telephone number of each witness, separately identifying witnesses the party expects to present and witnesses the party may call if the need arises;

(B) the designation of witnesses whose testimony is expected to be presented by means of a deposition and, if not taken stenographically, a transcript of the pertinent portions of the deposition testimony; and .

(C) an appropriate identification of each document or other exhibit, including summaries of other evidence, separately identifying those which the party expects to offer and those which the party may offer if the need arises. Unless otherwise stipulated by the parties or ordered by the court, the disclosures required by Subdivision (a)(4) shall be made at least 30 days before trial. Within 14 days thereafter, unless a different time is specified by the court, a party may serve and file a list disclosing (i) any objections to the use under Rule 32(a) of a deposition designated by another party under subparagraph (B) and (ii) any objection, together with the grounds therefor, that may be made to the admissibility of materials identified under subparagraph (C). Objections not so disclosed, other than objections under Rules 402 and 403 of the Utah Rules of Evidence, shall be deemed waived unless excused by the court for good cause shown.

(5) Form of disclosures. Unless otherwise stipulated by the parties or ordered by the court, all disclosures under paragraphs (1), (3) and (4) shall be made in writing, signed and served.

(6) Methods to discover additional matter. Parties may obtain discovery by one or more of the following methods: depositions upon oral examination or written questions; written interrogatories; production of documents or things or permission to enter upon land or other property, for inspection and other purposes; physical and mental examinations; and requests for admission.

(b) Discovery scope and limits. Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:

(1) In general. Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

(2) A party need not provide . discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost. The party shall expressly make any claim that the source is not reasonably accessible, describing the source, the nature and extent of the burden, the nature of the information not provided, and any other information that will enable other parties to assess the claim. On motion to compel discovery or for a protective order, the party from whom discovery is sought must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may order discovery from such sources if the requesting party shows good cause, considering the limitations of subsection (b)(3). The court may specify conditions for the discovery.

(3) Limitations. The frequency or extent of use of the discovery methods set forth in Subdivision (a)(6) shall be limited by the court if it determines that:

(A) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive;

(B) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or .

(C) the discovery is unduly burdensome or expensive, taking into account the needs of the case, the amount in controversy, limitations on the parties' resources, and the importance of the issues at stake in the litigation. The court may act upon its own initiative after reasonable notice or pursuant to a motion under Subdivision (c).

(4) Trial preparation: Materials. Subject to the provisions of Subdivision (b)(5) of this rule, a party may obtain discovery of documents and tangible things otherwise discoverable under Subdivision (b)(1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including the party's attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation. A party may obtain without the required showing a statement concerning the action or its subject matter previously made by that party. Upon request, a person not a party may obtain without the required showing a statement concerning the action or its subject matter previously made by that person. If the request is refused, the person may move for a court order. The provisions of Rule 37(a)(4) apply to the award of expenses incurred in relation to the motion. For purposes of this paragraph, a statement previously made is (A) a written statement signed or otherwise adopted or approved by the person making it, or (B) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement by the person making it and contemporaneously recorded.

(5) Trial preparation: Experts.

(A) A party may depose any person who has been identified as an expert whose opinions may be presented at trial. If a report is required under Subdivision (a)(3)(B), any deposition shall be conducted within 60 days after the report is provided.

(B) A party may discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or preparation for trial and who is not expected to be called as a witness at trial, only as provided in Rule 35(b) or upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means.

(C) Unless manifest injustice would result,

(i) The court shall require that the party seeking discovery pay the expert a reasonable fee for time spent in responding to discovery under Subdivision (b)(5) of this rule; and .

(ii) With respect to discovery obtained under Subdivision (b)(5)(A) of this rule the court may require, and with respect to discovery obtained under Subdivision (b)(5)(B) of this rule the court shall require, the party seeking discovery to pay the other party a fair portion of the fees and expenses reasonably incurred by the latter party in obtaining facts and opinions from the expert.

(6) Claims of privilege or protection of trial preparation materials.

(A) Information withheld. When a party withholds information otherwise discoverable under these rules by claiming that it is privileged or subject to protection as trial preparation material, the party shall make the claim expressly and shall describe the nature of the documents, communications, or things not produced or disclosed in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the applicability of the privilege or protection.

(B) Information produced. If information is produced in discovery that is subject to a claim of privilege or of protection as trial-preparation material, the party making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has and may not use or disclose the information until the claim is resolved. A receiving party may promptly present the information to the court under seal for a determination of the claim. If the receiving party disclosed the information before being notified, it must take reasonable steps to retrieve it. The producing party must preserve the information until the claim is resolved.

(c) Protective orders. Upon motion by a party or by the person from whom discovery is sought, accompanied by a certification that the movant has in good faith conferred or attempted to confer with other affected parties in an effort to resolve the dispute without court action, and for good cause shown, the court in which the action is pending or alternatively, on matters relating to a deposition, the court in the district where the deposition is to be taken may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following:

(1) that the discovery not be had;

(2) that the discovery may be had only on specified terms and conditions, including a designation of the time or place;

(3) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery;

(4) that certain matters not be inquired into, or that the scope of the discovery be limited to certain matters;

(5) that discovery be conducted with no one present except persons designated by the court;

(6) that a deposition after being sealed be opened only by order of the court;

(7) that a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way;

(8) that the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court. If the motion for a protective order is denied in whole or in part, the court may, on such terms and conditions as are just, order that any party or person provide or permit discovery. The provisions of Rule 37(a)(4) apply to the award of expenses incurred in relation to the motion.

(d) Sequence and timing of discovery. Except for cases exempt under Subdivision (a)(2), except as authorized under these rules, or unless otherwise stipulated by the parties or ordered by the court, a party may not seek discovery from any source before the parties have met and conferred as required by Subdivision (f). Unless otherwise stipulated by the parties or ordered by the court, fact discovery shall be completed within 240 days after the first answer is filed. Unless the court upon motion, for the convenience of parties and witnesses and in the interests of justice, orders otherwise, methods of discovery may be used in any sequence and the fact that a party is conducting discovery, whether by deposition or otherwise, shall not operate to delay any other party's discovery.

(e) Supplementation of responses. A party who has made a disclosure under Subdivision (a) or responded to a request for discovery with a response is under a duty to supplement the disclosure or response to include information thereafter acquired if ordered by the court or in the following circumstances:

(1) A party is under a duty to supplement at appropriate intervals disclosures under Subdivision (a) if the party learns that in some material respect the information disclosed is incomplete or incorrect and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing. With respect to testimony of an expert from whom a report is required under Subdivision (a)(3)(B) the duty extends both to information contained in the report and to information provided through a deposition of the expert.

(2) A party is under a duty seasonably to amend a prior response to an interrogatory, request for production, or request for admission if the party learns that the response is in some material respect incomplete or incorrect and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing.

(f) Discovery and scheduling conference. The following applies to all cases not exempt under Subdivision (a)(2), except as otherwise stipulated or directed by order.

(1) The parties shall, as soon as practicable after commencement of the action, meet in person or by telephone to discuss the nature and basis of their claims and defenses, to discuss the possibilities for settlement of the action, to make or arrange for the disclosures required by Subdivision (a)(1), to discuss any issues relating to preserving discoverable information and to develop a stipulated discovery plan. Plaintiff's counsel shall schedule the meeting. The attorneys of record shall be present at the meeting and shall attempt in good faith to agree upon the discovery plan.

(2) The plan shall include:

(A) what changes should be made in the timing, form, or requirement for disclosures under Subdivision (a), including a statement as to when disclosures under Subdivision (a)(1) were made or will be made;

(B) the subjects on which discovery may be needed, when discovery should be completed, whether discovery should be conducted in phases and whether discovery should be limited to particular issues;

(C) any issues relating to preservation, disclosure or discovery of electronically stored information, including the form or forms in which it should be produced;

(D) any issues relating to claims of privilege or of protection as trial-preparation material, including -- if the parties agree on a procedure to assert such claims after production -- whether to ask the court to include their agreement in an order;

(E) what changes should be made in the limitations on discovery imposed under these rules, and what other limitations should be imposed;

(F) the deadline for filing the description of the factual and legal basis for allocating fault to a non-party and the identity of the non-party; and .

(G) any other orders that should be entered by the court.

(3) Plaintiff's counsel shall submit to the court within 14 days after the meeting and in any event no more than 60 days after the first answer is filed a proposed form of order in conformity with the parties' stipulated discovery plan. The proposed form of order shall also include each of the subjects listed in Rule 16(b)(1)-(6), except that the date or dates for pretrial conferences, final pretrial conference and trial shall be scheduled with the court or may be deferred until the close of discovery. If the parties are unable to agree to the terms of a discovery plan or any part thereof, the plaintiff shall and any party may move the court for entry of a discovery order on any topic on which the parties are unable to agree. Unless otherwise ordered by the court, the presumptions established by these rules shall govern any subject not included within the parties' stipulated discovery plan.

(4) Any party may request a scheduling and management conference or order under Rule 16(b).

(5) A party joined after the meeting of the parties is bound by the stipulated discovery plan and discovery order, unless the court orders on stipulation or motion a modification of the discovery plan and order. The stipulation or motion shall be filed within a reasonable time after joinder.

(g) Signing of discovery requests, responses, and objections. Every request for discovery or response or objection thereto made by a party shall be signed by at least one attorney of record or by the party if the party is not represented, whose address shall be stated. The signature of the attorney or party constitutes a certification that the person has read the request, response, or objection and that to the best of the person's knowledge, information, and belief formed after reasonable inquiry it is: (1) consistent with these rules and warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law; (2) not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation; and (3) not unreasonable or unduly burdensome or expensive, given the needs of the case, the discovery already had in the case, the amount in controversy, and the importance of the issues at stake in the litigation. If a request, response, or objection is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the party making the request, response, or objection,

and a party shall not be obligated to take any action with respect to it until it is signed. If a certification is made in violation of the rule, the court, upon motion or upon its own initiative, shall impose upon the person who made the certification, the party on whose behalf the request, response, or objection is made, or both, an appropriate sanction, which may include an order to pay the amount of the reasonable expenses incurred because of the violation, including a reasonable attorney fee.

(h) Deposition where action pending in another state. Any party to an action or proceeding in another state may take the deposition of any person within this state, in the same manner and subject to the same conditions and limitations as if such action or proceeding were pending in this state, provided that in order to obtain a subpoena the notice of the taking of such deposition shall be filed with the clerk of the court of the county in which the person whose deposition is to be taken resides or is to be served, and provided further that all matters arising during the taking of such deposition which by the rules are required to be submitted to the court shall be submitted to the court in the county where the deposition is being taken.

(i) Filing.

(1) Unless otherwise ordered by the court, a party shall not file disclosures or requests for discovery with the court, but shall file only the original certificate of service stating that the disclosures or requests for discovery have been served on the other parties and the date of service. Unless otherwise ordered by the court, a party shall not file a response to a request for discovery with the court, but shall file only the original certificate of service stating that the response has been served on the other parties and the date of service. Except as provided in Rule 30(f)(1), Rule 32 or unless otherwise ordered by the court, depositions shall not be filed with the court.

(2) A party filing a motion under Subdivision (c) or a motion under Rule 37(a) shall attach to the motion a copy of the request for discovery or the response which is at issue.

HISTORY: Amended effective Jan. 1, 1987; November 1, 1999; April 1, 2000; November 1, 2000; November 1, 2002; May 2, 2005; November 1, 2007

NOTES:

Objectives. The 1999 amendments to Rules 16, 26, 30, 32 and 33 comprise a new model for discovery and case management in state court cases. The objective of the new model is simply to better manage litigation by planning. The amendments achieve this simple objective as follows:

1) They require the parties and encourage the judge to evaluate the case early in the process and to plan appropriate discovery;

2) They establish default deadlines and limits to govern those cases in which the parties cannot agree to a discovery plan and do not seek a judicial order; and

3) They require each party to disclose to other parties the names of persons with discoverable information supporting that party's claims or defenses, a description of documents supporting that party's claims or defenses, a computation of damages and the existence of insurance agreements.

The rule changes are intended to simplify discovery and promote full disclosure of discoverable information. The limits and deadlines specified in these rules are not intended to fit all cases. Parties should cooperate and stipulate to and courts should consider different deadlines and limits appropriate for specific cases. The rule changes that implement these objectives are as follows:

Discovery and Scheduling Conference of the Parties. Rule 26(f). The 1999 amendments require the parties to meet and confer about the case as soon as practicable after commencement of the action. (The deadline for filing the stipulated discovery plan effectively limits the time for the conference to within 46 days after the first answer is filed.) To help ensure the case does not stall, the rule imposes on plaintiff's counsel the obligation to schedule the meeting and to submit to the court the discovery plan and order resulting from the meeting. At the meeting the parties settle what they can and develop a discovery plan for any remaining issues. At this point the content of the discovery plan is entirely within the control of the parties. The rule suggests elements commonly raised in the course of discovery, but counsel should tailor the discovery plan to meet the needs of the particular case. Within 14 days after the meeting, plaintiff's counsel prepares a stipulated discovery plan and order, which is submitted to the court for approval. If the parties cannot agree or can only partially agree to a stipulated discovery plan, the plaintiff must and any party may move for a discov-

ery order. If the court does not order otherwise, the default deadlines and limits of the rules govern. Discovery proceeds in the normal course and in accordance with the discovery plan after the discovery and scheduling conference. The parties are required to meet once, but subsequent meetings, as necessary, to amend the discovery plan are not precluded.

A later-added party is bound by the discovery order but can conduct a discovery and scheduling conference to obtain a stipulated amendment to the original plan. If the parties will not stipulate to reasonable discovery by a later-added party, the court can order appropriate relief upon motion. The court should be sensitive to the nature, extent and timing of discovery by a later-added party.

Scheduling and Management Conference with the Court. Rule 16(b). The 1999 amendments provide that any party can file a motion for a discovery order on issues the parties cannot agree upon, and the court will rule upon that motion. Any party may seek a scheduling and management conference with the court, but, because of large caseloads, the rules permit the court to decline the conference. By conducting a scheduling and management conference, however, the court has the opportunity early in the process to evaluate the case and manage it accordingly, to explore mediation and settlement, to resolve disputes over the nature and extent of discovery, and to identify issues collateral to the litigation. It is not anticipated that judges will manage a case contrary to the stipulation of the parties. However, the court's interest in case management is independent of that of the parties, and the court needs the discretion independently to manage the case, especially when the parties cannot agree.

The scheduling and management conference is designed to encourage the parties and the court to take earlier and better control of the litigation. If possible, the trial date should be set at this conference as well as dates for all of the necessary pretrial steps and any modifications to the presumptions established by the discovery rules.

To avoid possible confusion surrounding the multiplicity of objectives of the various conferences with the court, the amendments delete the long list of objectives found in the former rule, which the committee determined are adequately covered under subsection (a). The objectives remain sound. The scheduling and management conference is a particular type of conference with specified and limited objectives. Any other conference prior to trial is properly called a pretrial conference and the objectives are more varied. In addition to the objectives in the rule itself, the following objectives may be appropriate:

(1) forming and simplifying issues and eliminating frivolous claims and defenses;

(2) obtaining admissions of fact and stipulations to documents;

(3) obtaining stipulations or rulings on the admissibility of evidence;

(4) referring matters to mediation or other alternative dispute resolution;

(5) adopting special procedures for managing actions that may involve complex issues of fact or law, multiple parties, or unusual proof problems; and

(6) the form and substance of a pretrial order.

Required Initial Disclosures. Rule 26(a). The 1999 amendments require each party to provide to all other parties the names of persons with discoverable information supporting that party's claims or defenses, a description of documents supporting that party's claims or defenses, a computation of any damages it claims and any insurance that may satisfy some or all of any judgment. This exchange of information occurs within 14 days after the discovery and scheduling conference of the parties. A party can only disclose that which is known at the time. As further information is developed, the party is under a duty to supplement the initial disclosures. If a party fails to comply with the disclosure rule, Rule 37(f) requires the court to prohibit the use of the witness or evidence at trial unless the failure was harmless or there is good cause for the failure. The court may order any other sanction it determines to be appropriate and Rule 37(f) provides some examples.

Expert reports. Rule 26(a)(3). Unlike the Federal Rules of Civil Procedure, an expert's report need not be written and signed by the expert. The report may be signed by the witness or the party. In addition to the qualifications of the expert, the report must contain the subject matter on which the expert is expected to testify, the substance of the facts and opinions to which the expert is expected to testify, and a summary of the grounds for each opinion. In effect, the report will serve in lieu of responses to standard interrogatories. The committee considered but decided not to adopt the federal rule governing expert reports. Both plaintiffs' attorneys and defense attorneys reported on the high cost of reports by experts, the growth of non-practicing experts as a profession, and the need to depose experts regardless of a written report. The expert should not be permitted to testify at variance with the report, regardless whether the expert or

the party prepares or signs it. For this reason, the committee believes the expert should prepare and sign the report whenever possible and should always review and approve the report. For genetics testing in paternity cases, compliance with Utah Code Title 78B, Chapter 15, Part 5 is sufficient to satisfy the expert report requirement unless a party objects and specifically requests a report under the rule.

Exempt cases. Rule 26(a)(2). The scope of the exemption is very limited. If a case is exempt, the parties do not need to meet and confer under Rule 26(f), and they do not need to disclose under Rule 26(a)(1). All other discovery provisions apply to exempt cases. All information subject to mandatory disclosure in a non-exempt case is subject to discovery using traditional methods in an exempt case. The committee did not seek to exempt simple cases. The rule amendments benefit simple as well as complex litigation. The only exempt cases are those identified in Rule 26(a)(2).

Depositions. Rule 30. The party taking the deposition may designate and pay for any method of recording the deposition. Any other party may designate and pay for an additional method of recording. The rule prohibits argumentative and suggestive objections.

Default Deadlines and Limits. The discovery rules establish presumptive deadlines and limits, the purpose of which are to encourage stipulations to deadlines and limits suitable to the needs of the particular case. If the discovery needs of the parties are not equivalent, the court, in entering a discovery order, should consider whether the presumptive deadlines and limits are being used by one party to frustrate legitimate discovery. The discovery rules establish the following new deadlines and limits, any of which can be modified by stipulation of the parties or order of the court:

Discovery and scheduling conference of the parties	Held as soon as practicable after commencement of the action. (The deadline for filing the stipulated discovery plan effectively limits the time for the conference to within 46 days after the first answer is filed.)
Stipulated discovery plan and order	Submit to court within 14 days after the discovery and scheduling conference but in no event more than 60 days after the first answer is filed.
Required initial disclosures	Provide within 14 days after the discovery and scheduling conference.
Supplement required initial disclosures	At appropriate intervals.
Amend response to interrogatories, request for production or request for admission	Seasonably.
Initial disclosures by later added party	Provide within 30 days after being served.
Motion by later added party to amend the discovery plan	File within a reasonable time after being joined.
Number of depositions oral and written	Ten per side.
Review and modify record of deposition	Within 30 days after notice that record is available but only if deponent requested opportunity to review record prior to completing deposition.
Interrogatories	No more than 25 questions, including discrete subparts.
Fact discovery	Begins after the parties conduct their discovery and scheduling conference. Closes 240 days after first appearance by a defendant.
Identify expert witnesses and disclose	Within 30 days after close of fact

expert reprots	discovery.
Identify rebuttal expert and disclose rebuttal expert reports	Within 60 days after disclosure by other party of expert identity and report.
Deposition of expert witness	Conduct within 60 days after disclosure of the expert's report.
Certify that case is ready for trial	File immediately upon the close of all discovery.
Pretrial disclosure of "will call" and "may call" witnesses, deposition testimony, and exhibits	Provide at least 30 days prior to trial.
Objections to pretrial disclosures	File within 14 days after pretrial disclosure.
Trial	Schedule as soon after certificate of readiness as is mutually convenient for court and parties.

Code of Judicial Administration. Rules 4-104 and 4-502 are being repealed and the provisions of those rules are being integrated into the Rule of Civil Procedure. The certificate of readiness for trial required by 4-104 is now in URCP 16(b) and the restrictions on filing discovery documents with the court are now in Rule 26(i).

Amendment Notes.-- The 2005 amendment, effective May 2, 2005, added Subdivision (f)(2)(D) and made related changes. It was approved as an expedited amendment under Rule 11-101(6)(F), subject to further change after the comment period.

The 2007 amendment added "electronically stored information" to the list in Subdivision (a)(1)(A); added Subdivisions (b)(2), (b)(6)(B), (f)(2)(C), and (f)2)(D); inserted "to discuss any issues relating to preserving discoverable information" in Subdivision (f)(1); made related changes; and corrected a minor error.

Compiler's Notes. -- . The Supreme Court order approving the amendments directed that the new procedures be applicable only to cases filed on or after November 1, 1999.

This rule corresponds to *Rule 26, F.R.C.P.*

Cross-References.-- Admissibility of evidence, § 78-21-3; U.R.C.P. 43(a).

Continuance to permit discovery, U.R.C.P. 56(f).

Depositions upon oral examination, U.R.C.P. 30(c).

Depositions, use in court proceedings, U.R.C.P. 32.

Depositions, when taken, U.R.C.P. 30(a).

Exclusion of deposition from evidence, U.R.C.P. 32(b).

Expert and other opinion testimony, U.R.E 701 to 706.

Fee for filing notice of deposition concerning action in another state, § 78-7-35.

Liability insurance, admissibility of, U.R.E 411.

Motions, evidence on, by depositions, U.R.C.P. 43(b).

Privileges, §§ 78-24-8, 78-24-9; U.R.E 501 et seq.

Summary judgment, discovery supporting or opposing motion for, U.R.C.P. 56(e).

Terminate or limit examination, motion to, U.R.C.P. 30(d).